

No. 407

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BERNARD MCGORRAY,

Appellant,

vs.

MYLES P. O'CONNOR, THOMAS CUN-
NINGHAM, C. K. BAILEY, E. F.
BAILEY, ANDREW WOLF, R. GNE-
KOW, JOHN JACKSON, T. W. NEW-
ELL, I. S. BOSTWICK, WM. INGLIS,
AND MOSES MARKS,

Appellees.

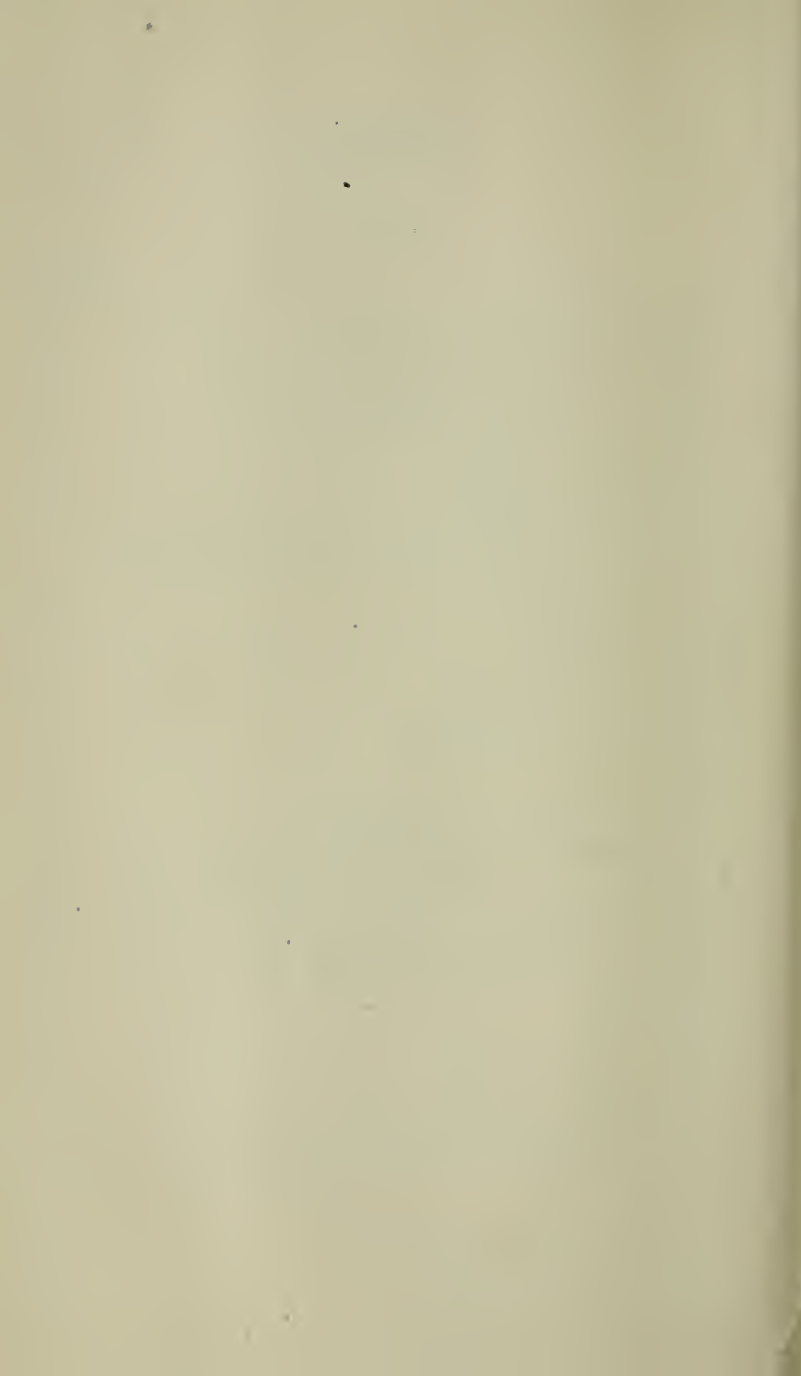
TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States,
Ninth Judicial Circuit, Northern District
of California.

FILED

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In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD MCGORRAY,

Plaintiff,

vs.

MYLES P. O'CONNOR, THOMAS CUNNINGHAM, C. K. BAILEY, E. F. BAILEY, ANDREW WOLF, R. GNEKOW, JOHN JACKSON, T. W. NEWELL, I. S. BOSTWICK, WM. INGLIS, and MOSES MARKS,

Defendants

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California:

Bernard McGorray, of Chicago, and a citizen of the State of Illinois, brings this his bill against Myles P. O'Connor, of San Francisco, and a citizen of the State of California, and Thomas Cunningham, C. K. Bailey, E. F.

Bailey, R. Gnekow, Andrew Wolf, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, all of Stockton, California,* and all citizens of the State of California.

And thereupon your orator complains and says that for many years previous to the 22d day of Jan. 1884, C. K. Bailey and C. W. Carpenter were general partners in farming and stockraising in the county of San Joaquin, State of California, under the firm name of Bailey and Carpenter.

That on the date last aforesaid the said Carpenter died in said county, and left an estate therein, which consisted largely of his undivided one-half interest in said partnership property of Bailey and Carpenter.

That afterward said C. K. Bailey filed in the office of the clerk of the Superior Court of said county a paper purporting to be the last will and testament of said C. W. Carpenter, deceased, in which the bulk of his property was given to the children of said C. K. Bailey, to the exclusion of his heirs at law.

That said C. K. Bailey was named therein as the executor of said alleged will, without bonds.

That afterwards such proceedings were had in said court that on the 23d day of February, 1884, upon petition duly filed in that behalf, the said pretended will was by an order of said Court in the matter of said estate duly admitted to probate as the last will and testament of said C. W. Carpenter, deceased, and the said Bailey was appointed the executor thereof without bonds as therein

provided, who thereupon took the oath of office and proceeded to act in that capacity, and still acts as such executor.

That the said C. W. Carpenter was a bachelor, and his next of kin and heirs at law were Clinton H. Carpenter, a brother and other brothers of the same family name, who within one year from the time of probate of said pretended will filed in said court in the matter of said estate their verified petition in writing, containing their allegations against the validity of said alleged will, and contesting the validity of the same on the ground of incompetency of said deceased and of fraud, menace, and undue influence on the part of said C. K. Bailey, and praying, among other things, that the probate thereof be revoked and annulled, and that said petitioners be declared the heirs at law of said deceased, and as such entitled to his estate.

That said executor and legatees were made parties defendant in said contest, and they all duly appeared in said action by their respective attorneys, and filed their answers therein denying the material allegations in said petition.

That two several trials were had in said Court and cause before a jury duly impaneled to try the issues raised as aforesaid, and each time the jury rendered a verdict against the validity of the will, and two several decrees were duly made and entered in said court in the matter of said estate in accordance with such verdicts, declaring said pretended will null and void, revoking and annulling the probate thereof, and declaring said petitioners the

heirs at law of said deceased, and as such entitled to his estate.

That an appeal was taken to the Supreme Court of the State of California from each of said decrees, and a new trial was granted in each instance. That the contest over said pretended will is still pending, and has been pending, in said Superior Court since the 21 day of February, 1885, when not on appeal as aforesaid.

II.

That on the 24th day of May, 1884, the said Clinton H. Carpenter and others heirs at law of said C. W. Carpenter, deceased, contestants, in the matter of said pretended will, and the said executor and legatees thereunder, proponents, duly made and entered into an agreement in writing, wherein and whereby the said matters of difference and controversy over said estate should be submitted to F. T. Baldwin, as arbitrator, who should determine in his award the value of said contestant's interest in said estate, and how much they, the said Clinton H. Carpenter and other heirs at law of said C. W. Carpenter, should receive from said estate of Carpenter as their share thereof, and expressly stipulating that such reference should in no way affect the controversy, then pending over said pretended will, but that the same should continue pending in said court, and not be discontinued or dismissed until the award of such arbitrator should be fully performed and carried out.

That said agreement of reference was duly delivered to said Baldwin, who thereupon accepted the appointment as such arbitrator, and afterward duly performed all the duties devolving upon him as such referee, such as were pointed out and included in the aforesaid agreement of reference.

That all the parties to said agreement duly appeared before said arbitrator and presented their case, and filed with him their respective claims upon all the matters to be considered and determined by him as such referee.

That afterwards, on the 4th day of January, 1894, said referee duly made and published his award in writing in the matter of such reference, by delivering to the attorneys of the respective parties thereto a duplicate copy in writing of said award in the premises, which was afterward filed in the office of the clerk of said Superior Court.

That it was decreed and determined in said award, among other things, that said Clinton H. Carpenter and other heirs' interest in said estate of C. W. Carpenter was of the value of \$11,256.75-100, which said sum the said Clinton and other heirs at law of said C. W. Carpenter were entitled to receive from his said estate.

That said award has never been carried out or performed, and is, and has been since its rendition, in full force and effect, and binding upon all the parties interested in said estate.

III.

That on the 30th day of October, 1882, the said firm of Bailey and Carpenter gave a mortgage to one Myles P.

O'Connor, as security for the payment of the sum of \$10,000, on the following real property situated in the county of San Joaquin, in the State of California, and more particularly described as follows, namely: The east half and northwest quarter of the northeast quarter of section five, in township two, north of range eight, east Mount Diablo base and meridian, and the southeast quarter and the east half of the southwest quarter of section thirty-two, in township three, north of range eight, east of Mount Diablo base and meridian, and known as the Bailey and Carpenter "home place," which said real property was a part of the assets of the firm of Bailey and Carpenter, and part of the assets of the estate of C. W. Carpenter, deceased, to which the said Clinton H. Carpenter and other heirs were entitled as the successors in interest to their late brother.

That subsequent to the death of said C. W. Carpenter, and on the 10th day of October, 1888, an action was brought in said Superior Court of San Joaquin county by the said O'Connor against said C. K. Bailey, Clinton H. Carpenter, as one of the successors in interest of the said C. W. Carpenter, deceased, and others, defendants, to foreclose said mortgage, and on the 15th day of March, 1890, a decree of foreclosure and sale was duly made and entered in said court and cause against said C. K. Bailey and Clinton H. Carpenter and others, defendants, and in favor of said plaintiff, for the sum of \$11,808.74, the amount found to be due on said mortgage note and the costs of suit.

That on the 15th day of May, 1894, under an order of said Court previously made in said action of foreclosure, said real property was sold to the said O'Connor at sheriff's sale at Stockton, in said county of San Joaquin, by Thomas Cunningham, who was the duly elected, qualified, and acting sheriff of said county, under and by virtue of an execution duly issued out of said court under said judgment and decree in favor of said O'Connor. That thereupon a sheriff's certificate of sale was duly given by said sheriff to said Myles P. O'Connor, as such purchaser, in which it was stated, among other things, that said real property, sold as aforesaid, was subject to redemption, and the same was subject to redemption by any of said defendants in said action of foreclosure.

IV.

That on the 15th day of September, 1894, Amos H. Carpenter recovered judgment in the Superior Court of said San Joaquin county, against said Clinton H. Carpenter, for the sum of \$12,438 damages and costs, and on the same day said judgment was duly docketed by the clerk of said court in his office, so that it became a lien upon the said Clinton H. Carpenter's interest or portion of the real property herein described.

That afterward, on the 17th day of September, 1894, for a good and valuable consideration, said Amos H. Carpenter sold, assigned, and transferred said judgment of \$12,438 in his favor, and against said Clinton H. Carpenter,

to your orator, who ever since has been, and now is, the lawful owner and holder thereof.

V.

That after the assignment of said judgment as aforesaid, and on the 18th day of September, 1894, your orator, in the capacity of a judgment creditor of said Clinton H. Carpenter, having a lien on his interest or portion of the real property herein described, handed and tendered to said Thomas Cunningham, as the officer making the sale of said real property, the sum of \$12,777.05 in United States gold coin, the same being the full amount of the purchase price of said realty, together with two per cent per month thereon in addition up to that time, and the amount of all taxes and legal assessments paid by said purchaser since the date of sale, for the redemption of said real estate from said mortgage sale, and at the same time handed and produced to said officer a written notice of such redemption, signed by your orator, and stating, among other things, the said capacity in which such redemption was made, a description of the property redeemed, the judgment and execution under which the sale was made, the fact that said Clinton H. Carpenter was a successor in interest to a portion of the said C. W. Carpenter's interest in said property and of the defendants in said action of foreclosure, a description of the said judgment against Clinton H. Carpenter, the docketing of the same by the clerk of said court, and the consequent lien thereof on said realty, the assignment of such judgment to your orator, together with a copy of the docket of the

judgment under which your orator claimed the right to redeem, certified by the clerk of said court, a copy of said assignment from Amos H. Carpenter verified by your orator's affidavit, and his affidavit, showing the amount then actually due on such judgment lien, and thereupon filed a duplicate notice of such redemption in the office of the recorder of said San Joaquin county.

That said officer refused, and ever since has refused, and still continues to refuse, to receive the money for the redemption of said property tendered as aforesaid, and the same was, and ever since has been, and still is, deposited in a bank known as the Stockton Savings and Loan Society at Stockton, California, for the purpose aforesaid, subject to the order of said officer making said sale.

That at the time of such refusal by said sheriff your orator gave him due notice that said gold coin was deposited in said bank for the purpose aforesaid subject to his order, and that such tender would be kept good, and that such amount in gold coin could be drawn by him from said bank at any time upon the giving of the usual certificate of redemption or sheriff's deed for said property.

That after the expiration of six months from the date of said sale, and no judgment debtor having redeemed said property from said mortgage sale, and after the expiration of sixty days from the date of said redemption by your orator, and no other redemptioner having redeemed, your orator demanded of said officer a sheriff's deed of

said real property, such as is usually given in such cases to a redemptioner.

That said sheriff has refused, and still continues to refuse to give a deed thereof to your orator as demanded, and on the 16th day of November, 1894, the said officer made, executed, and delivered to the said Myles P. O'Connor, as purchaser, a sheriff's deed of said property, in which it was stated and recited that no redemption from said mortgage sale had been made, when the said purchaser and the said sheriff well knew such statement to be untrue.

That the said O'Connor has accepted said sheriff's deed notwithstanding such redemption by your orator, and has taken possession of said premises, and refuses to recognize your orator's right to redeem the same as a judgment creditor of Clinton H. Carpenter.

That said real property is of the value of about \$34,770.

VI.

That said estate of Carpenter has not been distributed or separated from the partnership assets of Bailey and Carpenter; but is still in the hands of said C. K. Bailey, who still continues to wrongfully carry on said partnership business as though such partnership existed.

That, on information and belief, the said C. K. Bailey has nearly wrecked said estate, and rendered the same nearly insolvent through fraud or mismanagement, and has allowed said property to be sold, for the purpose of defrauding the heirs at law of said Carpenter of their in-

heritance and your orator of the benefit of said judgment lien, and that in pursuance of such purpose, and in collusion with said sheriff, purchaser, and others, he caused said redemption to be prevented and refused, with the intention of securing said property again from the purchaser for himself, or some member of his family, after your orator's and said heirs' right of redemption had expired.

That E. F. Bailey is the son of said C. K. Bailey, and one of the legatees under said pretended will, and that he and the said C. K. Bailey are now farming and carrying on said premises, and dividing the profits thereof with the said purchaser.

That the said E. F. and C. K. Bailey claim some interest in said property, either by lease or otherwise, under said purchaser, the exact nature of which is now unknown to your orator.

VII.

That the annual rents and profits of said real property are of the value of about \$1,825, and that the same have been taken and appropriated by the said Baileys or the said O'Connor since the 15th day of May, 1894, no part of which have been received by your orator.

VIII.

That by reason of the aforesaid wrongful and illegal acts of said defendants, your orator is unable to redeem said real property from said mortgage sale, and to enforce

his judgment lien against said Clinton H. Carpenter's portion of said real property, as the successor in interest to his brother's estate, and to get possession and title to said premises as allowed by law, and has thereby been damaged in the sum of \$34,770, the value of said real property at the time of said redemption, and in the further sum of \$1,825, the value of the rents and profits thereof since the 15th day of May, 1894, up to the time of the commencement of this action, and in the further sum of \$2,000 for attorney fees made and incurred herein.

IX.

That on the 21st day of November, 1892, the said Thomas Cunningham, as principal, and R. Gnekow, Andrew Wolf, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, as sureties made, executed, and delivered to the people of the State of California a bond in the sum of \$60,000, conditioned that during the next official term commencing on or about the 1st day of January, 1895, the said Thomas Cunningham should well and faithfully perform all the duties devolving by law upon him as sheriff of said county of San Joaquin, to which office he was duly elected at the last general election held in the State of California, on the 8th day of November, 1892, and that in case of his failure so to act, the said sureties should become jointly and severally liable with said principal for all damages sustained by reason of his failure, neglect, or refusal to perform the duties of such sheriff as required by law.

Wherefore, your orator prays that a writ of subpoena issue out of this Honorable Court directed to Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, R. Gnekow, Andrew Wolf, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis and Moses Marks, to appear and answer the foregoing petition as required by law; that a decree may be made and entered against said defendants; that said sheriff's deed made, executed, and delivered to the said O'Connor by said officer on the 16th day of November, 1894, be delivered up to be canceled, and the same be declared null and void; that your orator be allowed to redeem said premises in the character of a judgment creditor of Clinton H. Carpenter; that said Thomas Cunningham, as the officer making the sale of said property, make, execute, and deliver to your orator a sheriff's deed of said premises, such as is usually made in case of a redemption of real property from a mortgage sale by a redemptioner; that said C. K. Bailey and E. F. Bailey have no right, title, or interest in and to said premises, and that they are trespassers thereon; that defendants be removed from the possession of said premises, and that your orator be placed in possession thereof; and for the sum of \$1,825, the value of the rents and profits of said real property from the 15th day of May, 1894, up to the time of the commencement of this action, and for the sum of \$2,000, as attorney fees incurred herein and the costs of this proceeding; that in case title and possession of said real property cannot be had, for the sum of \$34,770, the value of said premises, in lieu of such re-

demption, and for such other and further relief as to the Court may seem just and equitable.

L. W. ELLIOTT,
Solicitor for Plaintiff.

State of California, }
County of } ss.

Bernard McGorray, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing bill, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated on his information and belief, and to those matters, that he believes it to be true.

BERNARD MCGORRAY.

Subscribed and sworn to before me this 6th day of December, 1894.

W. J. COSTIGAN,

Commissioner and Clerk U. S. Circuit Court, Northern District of California.

[Endorsed]: Filed December 6th, 1894. W. J. Costigan, Clerk.

Subpoena ad Respondendum.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial Circuit,
Northern District of California.*

IN EQUITY.

The President of the United States of America, Greeting,
to Myles P. O'Connor, Thomas Cunningham, C. K.
Bailey, E. F. Bailey, R. Gnekow, Andrew Wolf, John
Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis,
and Moses Marks:

You are hereby commanded, that you be and appear in
said Circuit Court of the United States aforesaid, at the
courtroom in San Francisco, on the fourth day of Feb-
ruary, A. D. 1895, to answer a bill of complaint exhibited
against you in said court by Bernard McGorray, who is a
citizen of the State of Illinois, and to do and receive what
the said Court shall have considered in that behalf. And
this you are not to omit, under the penalty of five thou-
sand dollars.

Witness, the Honorable MELVILLE W. FULLER,
Chief Justice of the United States, this 3d day of Janu-

ary, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the 119th.

[Seal]

W. J. COSTIGAN,
Clerk.

By W. B. Beazley,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court U. S.—You are hereby required to enter your appearance in the above suit, on or before the first Monday of February next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

W. J. COSTIGAN,
Clerk.

By W. B. Beazley,
Deputy Clerk.

[Endorsed]:

United States Marshal's Office, }
Northern District of California. }

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 9th day of January, 1895, on Myles P. O'Connor, by delivering to, and leaving with, Patrick Dougherty, an adult person, who is a resident in the family of Myles P. O'Connor said defendant named therein, at the county of Santa Clara, in said district, an attested copy thereof, at

the dwelling-house of Myles P. O'Connor, one of said defendants herein.

San Francisco, January 25th, 1895.

BARRY BALDWIN,

U. S. Marshal.

By P. H. Maloney,

Deputy.

United States Marshal's Office, }
Northern District of California. }

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 11th day of ——— 189 , on Thomas Cunningham and I. S. Bostwick, by delivering to, and leaving with, Thomas Cunningham and I. S. Bostwick, said defendants named therein, at the county of San Joaquin, in said district, an attested copy thereof.

San Francisco, January 25th, 1895.

BARRY BALDWIN,

U. S. Marshal.

By P. H. Maloney,

Deputy.

United States Marshal's Office, }
Northern District of California. }

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 12th day of January, 1895, on John Jackson, R.

Gnekow, Andrew Wolf, T. W. Newell, Wm. Inglis, by delivering to, and leaving with John Jackson, R. Gnekow, Andrew Wolf, T. W. Newell, Wm. Inglis, said defendants named therein, at the county of San Joaquin, in said district, an attested copy thereof.

San Francisco, January 25th, 1895.

BARRY BALDWIN,

U. S. Marshal.

By P. H. Maloney,

Deputy.

United States Marshal's Office, }
Northern District of California. }

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 12th day of January, 1895, on Moses Marks, by delivering to, and leaving with, M. P. Stein, an adult person, who is a member or resident in the family of Moses Marks, said defendant named therein, at the county of San Joaquin, in said district, an attested copy thereof, one of said defendants herein.

San Francisco, January 25th, 1895.

BARRY BALDWIN,

U. S. Marshal.

By P. H. Maloney,

Deputy.

United States Marshal's Office, }
Northern District of California. }

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 14th day of January, 1895, on E. F. Bailey, by delivering to, and with, C. K. Bailey, his father, said defendant named therein, personally, at the county of San Joaquin, in said district, a certified copy thereof.

San Francisco, January 25th, 1895.

BARRY BALDWIN,

U. S. Marshal.

By P. H. Maloney,

Deputy.

United States Marshal's Office, }
Northern District of California. }

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 14th day of January, 1895, on C. K. Bailey, by delivering to, and leaving with, C. K. Bailey, said defendant named therein, personally, at the county of San Joaquin, in said district, a certified copy thereof.

San Francisco, January 25th, 1895.

BARRY BALDWIN,

U. S. Marshal.

By P. H. Maloney,

Deputy.

Filed January 25. 1895. W. J. Costigan, Clerk. By W. B. Beazley, Deputy Clerk.

United States Marshal's Office, }
 Northern District of California. }

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 9th day of January, 1895, by delivering to, and leaving with, Patrick Dougherty, an adult person, an attested copy thereof, at the dwelling-house of Miles P. O'Connor, one of the defendants herein, at the county of Santa Clara, in said district, and Patrick Dougherty stated to me, when I told him I wanted to make a legal service, and it was necessary for me to know if he was a resident of the family, at the same time reading the blank return on the back of said writ to him, that Miles P. O'Connor and his family were at that time in France. At the time of said service Patrick Dougherty came out of the said dwelling-house of Miles P. O'Connor, and I delivered to and left said attested copy of said writ with him, the said Patrick Dougherty, just outside of the kitchen door of said dwelling; and said Patrick Dougherty, in response to my questions, said he resided there then at the times above stated, and was taking care of the place, and that he was employed there and lived there on the premises before Miles P. O'Connor and his family went to France.

Dated San Francisco, this 7th day of May, 1895.

BARRY BALDWIN,

United States Marshal.

By P. H. Maloney,

Deputy.

*Circuit Court of the United States, Ninth Judicial Circuit
Northern District of California.*

BERNARD MCGORRAY,

Plaintiff,

vs.

MILES P. O'CONNOR, THOMAS CUN-

NINGHAM, C. K. BAILEY, E. F.

BAILEY, ANDREW WOLF, R.

GNEKOW, JOHN JACKSON, T. W.

NEWELL, I. S. BOSTWICK, WIL-

LIAM INGLIS, and MOSES MARKS,

Defendants.

Demurrer of Thomas Cunningham et al.

The demurrer of the above-named defendants, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, William Inglis, and Moses Marks, to the bill of complaint of the above named plaintiff.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, jointly demur to the said bill, and for causes of demurrer showeth:

I.

That enough does not appear upon the face of the bill to show the Court's jurisdiction of the suit, in consequence of the want of proper and necessary averment of citizenship of the parties.

II.

That it appeareth by the plaintiff's own showing by the said bill that he is not entitled to the relief prayed by the bill against these defendants or any of them.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants do demur thereto. And they pray the judgment of this Court whether they, or any of them, shall be compelled to make any answer to the said bill; and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

DUDLEY & BUCK,

Solicitors and of Counsel for Defendants, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Adrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, William Inglis, and Moses Marks.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

Feby. 28, 1895.

GEORGE F. BUCK,

Of Counsel for the Defendants Who have Demurred.

State of California, }
County of San Joaquin. } ss.

Thomas Cunningham, being duly sworn, deposes and says: I am one of the above-named defendants; the foregoing demurrer is not interposed for delay.

THOS. CUNNINGHAM.

Subscribed and sworn to before me this 28th day of Feb., 1895.

[Seal] C. W. WILBER,
Notary Public in and for the County and State aforesaid.

Rec'd copy March 2d, 1895, within demurrer.

L. W. ELLIOTT,
Sol. for Plaintiff.

[Endorsed]: Filed March 4th, 1895. W. J. Costigan,
Clerk.

Alias Subpoena ad Respondendum.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial Circuit,
Northern District of California.*

IN EQUITY.

The President of the United States of America, Greeting,
to Myles P. O'Connor.

You are hereby, as you have heretofore been command-
ed, that you be and appear in said Circuit Court of the
United States aforesaid, at the courtroom in San Francis-
co, on the second day of December, A. D. 1895, to answer
a bill of complaint exhibited against you in said court by
Bernard McGorray, who is a citizen of the State of Illi-
nois, and to do and receive what the said Court shall have
considered in that behalf. And this you are not to omit,
under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER,
Chief Justice of the United States, this 5th day of No-
vember, in the year of our Lord one thousand eight hun-
dred and ninety-five, and of our Independence the 120th.

[Seal]

W. J. COSTIGAN,

Clerk.

By W. B. Beaizley,

Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.—You are hereby required to enter your appearance in the above suit, on or before the first Monday of December next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

W. J. COSTIGAN,

Clerk.

By W. B. Beaizley,

Deputy Clerk.

[Endorsed]:

United States Marshal's Office, }
Northern District of California. }

I hereby certify that I received the within writ on the 5th day of November, 1895, and personally served the same on the 5th day of November, 1895, on Myles P. O'Connor, by delivering to and leaving with Myles P. O'Connor, said defendant named therein, at the city and county of San Francisco, in said district, an attested copy thereof.

San Francisco, November 5th, 1895.

BARRY BALDWIN,

U. S. Marshal.

By J. D. Harris,

Deputy.

Filed Nov. 6th, 1895 W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, for the Northern District of California.

BERNARD MCGORRAY,

Plaintiff,

vs.

MYLES P. O'CONNOR et al.,

Defendants.

Demurrer of Myles P. O'Connor to Bill of Complaint.

This defendant by protestation, not confessing or acknowledging all or any of the matters in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows that the said complainant hath not in said bill made or stated such a cause as does or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

Wherefore, this defendant demands the judgment of this Honorable Court whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed, with his reasonable costs in this behalf sustained.

OLNEY & OLNEY,
Solicitors for Defendant O'Connor.
WARREN OLNEY, of counsel.

Certificate of Counsel.

I, Warren Olney, do hereby certify that I am counsel for the defendant O'Connor in the above-entitled action, and that, in my opinion, the foregoing demurrer is well founded in point of law, and that said demurrer is not interposed for delay.

Dated San Francisco, December 2d, 1895.

WARREN OLNEY,

[Endorsed]: Filed Dec. 2d, 1895. W. J. Costigan,
Clerk.

At a stated term, to-wit, the February term, A. D. 1896, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 2d day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Present, The Honorable JOSEPH McKENNA, Circuit Judge.

BERNARD MCGORRAY,

vs.

MYLES P. O'CONNOR et al.,

} No. 12022.

Order Overruling Demurrers.

The demurrers to the bill herein heretofore submitted having been fully considered, it was ordered that said demurrers be, and they hereby are, overruled, with leave to defendants to plead to the jurisdiction, or answer within twenty days.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD MCGORRAY,

Plaintiff,

vs.

MYLES P. O'CONNOR et al.,

Defendants.

Answer of Defendant Myles P. O'Connor.

Now comes the defendant, Myles P. O'Connor, in the above-entitled action, and for answer to the bill of com-

plaint filed herein admits, alleges, and denies as follows:

He alleges upon his information and belief, that Bernard McGorray, the complainant herein, was, at the date of filing the bill of complaint herein, and for a long time prior thereto, a citizen of the State of California, and was not a citizen of the State of Illinois, as in said bill of complaint alleged.

He admits that for many years previous to the 22d day of January, 1884, C. K. Bailey and C. W. Carpenter were general partners in farming and stock-raising in the county of San Joaquin, State of California, under the firm name of "Bailey & Carpenter."

He admits that on the 22d day of January, 1884, said C. W. Carpenter died in said county of San Joaquin and left an estate therein, which consisted largely of his undivided one-half interest in said partnership property of Bailey & Carpenter.

He admits and alleges that afterwards said C. K. Bailey filed in the office of the clerk of the Superior Court of said county of San Joaquin a paper purporting to be the last will and testament of said C. W. Carpenter, deceased, in which the bulk of his property was given to the children of said C. K. Bailey to the exclusion of his heirs at law.

He admits that said C. K. Bailey was named therein as the executor of said will without bonds.

He admits and alleges that afterwards such proceedings were had in said court on the 23d day of February, 1884, upon petition duly filed in that behalf, the said will of C. W. Carpenter was, by an order and judgment of said

Court duly entered and made in the matter of said estate, duly admitted to probate as the last will and testament of said C. W. Carpenter, deceased, and the said C. K. Bailey was appointed the executor thereof without bonds, as therein provided, who thereupon took the oath of office, and proceeded to act in that capacity, and still acts as such executor.

He admits that the said C. W. Carpenter was a bachelor, and that his next of kin and heirs at law were Clinton H. Carpenter, a brother, and other brothers of said deceased, and the children of other brothers and sisters of said deceased, who, within one year from the time of the probate of said will of C. W. Carpenter, filed in said court in the matter of said estate their petition in writing, containing their allegations against the validity of said will, and contesting the validity of the said will, on the ground of incompetency of said deceased, and of fraud, menace, and undue influence on the part of said C. K. Bailey, and praying, among other things, that the probate thereof be revoked and annulled, and that said petitioners be declared the heirs at law of said deceased, and as such entitled to his estate.

He admits that said executor and legatees were made parties defendant in said contest, and they all duly appeared in said action, by their respective attorneys, and filed their answer therein denying the material allegations in said petition.

He admits that two trials were had in said court upon the issues raised as aforesaid in the matter of the contest

of said will, and each time the jury rendered a verdict against the validity of the will, and that decrees were duly made and entered in said court in the matter of said estate in accordance with such verdicts, and that upon appeal to the Supreme Court of the State of California, each of said decrees were reversed, and a new trial granted in each instance, and that the contest over said pretended will is still pending in said Superior Court.

He alleges, upon his information and belief, that the contract or agreement for submitting the differences in controversy between the proponents of said will and the heirs of said C. W. Carpenter is in the words and figures following to-wit:

In the Superior Court of the County of San Joaquin, State of California

In the Matter of the Estate of C. W.

CARPENTER, Deceased.

ABEL F. CARPENTER et al, Contestants,

vs.

C. K. BAILEY, et al., Proponents.

Whereas a contest of the will of C. W. Carpenter is now pending and undetermined between the above-named contestants and proponents, and all parties interested in the said contest agree that the same be settled, compro-

mised, and terminated, and further litigation thereunder prevented.

And whereas the parties thereto are unable to agree upon the terms of settlement and compromise, and are willing to submit the question to Frank T. Baldwin for determination:

Now, therefore, in consideration of the premises, and in consideration of and for the purpose of avoiding and preventing further litigation in the matter of the said estate, and settling and terminating the said contest, and in consideration of the mutual promise hereby made, it is hereby agreed, by and between the said contestants and proponents, that the said matter shall be referred to Frank T. Baldwin, as referee, to fix and determine what under all the circumstances of the case is a reasonable, just, and equitable amount or portion of the said estate to be set over to such contestants in full of all claims of each and every of them.

“He, the said referee, shall ascertain and determine the present net value of the said estate, and for such purpose may take such steps as he may deem necessary. He shall fix and determine the value of the land of the said estate per acre, and also the amount of money which the contestants are entitled justly and equitably to receive, and shall thereupon deliver his written statement thereof to the attorneys of the respective parties to such contest.

The proponents shall have five days from and after the receipt of such statement within which to decide whether they will pay contestants in land or money. If they elect

to pay in land, there shall be made and delivered to the said contestants' attorney in fact, A. H. Carpenter, within thirty days from the time of the exercise of such election, deeds of so much of the said land as at the valuation fixed and determined by the said referee per acre shall make the amount found by the referee as the sum to be paid to such contestants, which said land shall be in one parcel, and may be designated by the said referee, provided, however, that the land deed shall not include any part of the west half of section 32, in township 3 north, range 9 east, M. D. M., nor any part of the 'home place,' so called.

The said contestants and proponents hereby agree to be bound by the findings of the said referee, and the said findings shall be binding upon each and every of them, and said parties may, and they are hereby given the right to, take any and all proper and legal steps and measures to enforce the full and perfect performance thereof, either to obtain the dismissal of said contest on the one part, or the specific performance of this agreement upon the other.

The said referee shall be allowed for his services the sum of \$250, and such sum in addition thereto as may be required to pay such expenses as may be incurred by him in and about the reference, which sums shall be paid out of the said estate.

None of the parties hereto shall have the right to offer any evidence before the said referee, but such referee, for the purpose of aiding him in determining the true condition and value of the said estate, may call for statements from either party hereto, and take such evidence

as to him shall seem necessary to a proper determination of the question hereby submitted to him.

“In determining the amount to be allowed to the contestants, and in considering the claims against the said estate, the referee shall also take into consideration the fact that a certain claim of C. K. Bailey, filed and approved in said estate for a note made by deceased in his lifetime, is contested for the same reasons and on the same grounds as made to the will.

“In witness whereof, the said contestants and proponents have hereunto affixed their hands and seals this day of May, 1893.

It is further stipulated and agreed that if either or any of said parties refuse to conform to or abide by the decision of said referee, or carry out the provisions thereof, a decree may and shall be entered in the matter of the contested will herein against the parties so refusing to abide by or carry out the decision of the said referee, and that said decree shall be entered against the party or parties so refusing the same as though said contest had been tried by a jury and a verdict rendered against said party or parties so refusing to abide by or carry out said award.

Dated May , 1893.

L. M. WALKER,
E. D. MIDDLEKAUFF,
ADDIE MIDDLEKAUFF,
NETTIE O. WALKER,
HATTIE M. BAILEY,
EDDIE F. BAILEY,
C. K. BAILEY.

A. H. CARPENTER,
Attorney in Fact for Contestants.

This agreement is signed by the said A. H. Carpenter, upon the condition that the original contract shall be carried out, namely: That only the legal claims against said estate shall be considered and the determination of the referee as to such legality shall be final and conclusive; that said referee shall designate the land to be received by the contestants; and that said Carpenter shall receive two span of good driving horses to be taken at appraised value as a part of such award.

May 24th, 1893.

A. H. CARPENTER.

Those horses that C. K. Bailey is in the habit of driving shall not be chosen by the said Carpenter.

Exhibit on motion this 8th Oct., 1894.

ANSEL SMITH, Judge.

[Endorsed]: Filed October 8th, 1894. C. W. Yolland, Clerk. By T. H. Heffernan, Deputy Clerk.

He alleges, upon information and belief, that the only agreement between the said proponents and the said contestants of said will in relation to arbitration is the one above set out, and is the agreement referred to in paragraph 11 of the bill of complaint.

He alleges that any statement contained in the bill of complaint of the terms of said agreement, other and different from those set out in the agreement hereinabove copied in full, is false and untrue.

He admits and alleges that said agreement of reference was duly delivered to said Baldwin, who thereupon accepted the appointment as such arbitrator, and after-

ward duly performed all the duties devolving upon him as such referee as were pointed out and included in the aforesaid agreement of reference.

He admits that all the parties to said agreement duly appeared before said arbitrator and presented their cases, and filed with him their respective claims upon all the matters to be considered and determined by him as such referee.

He admits that afterwards, on the 4th day of January, 1894, said referee duly made and published his award in writing in the matter of said reference, by delivering to the attorneys of the respective parties thereto a duplicate of said award in the premises, which was afterward filed in the office of the clerk of said Superior Court.

He alleges that the award in writing of said Baldwin, referee as aforesaid, is in the words and figures following to-wit

In the Superior Court of the County of San Joaquin, State of California.

ABEL F. CARPENTER et al.,	}
Contestants.	
vs.	
C. K. BAILEY, et al.,	}
Proponents.	

To the Honorable, the Superior Court of the County of San Joaquin, State of California, and to proponents and contestants herein:

“A reference having been heretofore made to me by agreement of said proponents and contestants, dated May 24, 1893, authorizing and empowering me to fix and determine a compromise and settlement of the above-entitled matter, and requiring me to report the same to proponents and contestants herein, I herewith respectfully submit the following as my report as such referee:

“That I have taken testimony herein, and fully considered the same, and also the statements of proponents and contestants submitted to me, and have examined the records of the Court pertaining to the said matter, and hereby fix the annexed statement to be a true and correct statement of all matters submitted to me for reference and decision.

Total value of the estate of C. W. Carpenter, deceased,	\$31,513.50
Total indebtedness of said estate	9,000.00
Net value of the estate of C. W. Carpenter, deceased.	22,513.50

“Value of the interest of children of C. K. Bailey in the estate of C. W. Carpenter, deceased, I find to be \$11,256.75.

“Value of the interest of the contestants herein in the estate of C. W. Carpenter, deceased, I find to be in money, \$11,256.75.

“In case contestants elect to take land instead of said sums of money, I hereby select and designate the following pieces or parcels of land belonging to said partnership, as and for contestants’ share of said estate in lieu of said sum of \$11,256.75, the money value thereof.

“1st. That certain piece or parcel of land situate, lying and being in the county of San Joaquin, State of California, and particularly described as follows, to-wit:

“The east 561 acres of section 25, township 3 north, range 8 east, Mt. Diablo base and meridian, and valued by me at \$16.00 per acre, or a total value of \$8,976.00.

“2d. That certain piece or parcel of land situate, lying and being in the county of San Joaquin, State of California, and particularly described as follows, to-wit:

“The southwest quarter of section 30, township 3 north, range 9 east, Mt. Diablo base and meridian, consisting of 228 acres, and valued by me at \$10.00 per acre, or the total value of \$2,280.00.

Total value of lands thus described and designated,
\$11,256.00.

Most respectfully submitted

F. T. BALDWIN,

Referee.

Dated January 4th, 1894.

[Endorsed]: 1271. Carpenter v. Bailey. Filed October 8th, 1894. C. W. Yoland, Clerk. By T. H. Heffernan, Deputy Clerk."

He admits and alleges that the foregoing award is the award in writing referred to in paragraph 11 of the complaint.

He admits and alleges that said award is, and has been since its rendition, in full force and effect, and binding upon all the parties to said agreement of reference; but he denies that it is binding upon this defendant.

He admits and alleges that on the 30th day of October, 1882, the said firm of Bailey & Carpenter gave a mortgage to this defendant, as security for the payment of the sum of \$10,000 upon the real property situated in the county of San Joaquin, State of California, and more particularly described as follows, viz:

The east half of the northeast quarter of the northeast quarter of section 5, in township 2 north, range 8 east, Mt. Diablo base and meridian; and the southeast quarter and the east half of the southwest quarter of section 32, in township 3 north, range 8 east, Mt. Diablo base and meridian, and known as the "Bailey & Carpenter Home

Place.” He admits and alleges that said real property at all times was a part of the assets of the firm of “Bailey & Carpenter.”

But he denies that said real property constituted any part of the assets of the estate of C. W. Carpenter, or that Clinton H. Carpenter, or any other heirs of the said deceased, were or are entitled to any interest therein as the successors in interest of their late brother, the said C. W. Carpenter, deceased.

He admits and alleges that subsequent to the death of said C. W. Carpenter, and on the 10th day of October, 1888, an action was brought in said Superior Court of San Joaquin county by this defendant against the said C. K. Bailey individually, C. K. Bailey as executor of the will of C. W. Carpenter, deceased, and C. K. Bailey as the surviving partner of the firm of Bailey & Carpenter, to foreclose said mortgage. Said action was brought under and in compliance with the provisions of chapter I, title 10, part II, of the Code of Civil Procedure of the State of California.

He admits that he made certain heirs and legatees of C. W. Carpenter, deceased, parties defendant in said foreclosure suit; but in that behalf he alleges that said heirs and legatees were not necessary or proper parties defendant, and that the only purpose of making said heirs and legatees defendants was a precautionary one, and in order to cut off any possible right of redemption they might have from the said mortgage.

He alleges that on the 15th day of March, 1890, the Superior Court of the county of San Joaquin, State of

California, gave, made, and entered a judgment in compliance with said provisions of said Code of Civil Procedure, foreclosing the said mortgage, and directing the real property in said mortgage described to be sold for the purpose of satisfying the judgment.

He alleges that said judgment of foreclosure was in favor of this defendant, plaintiff therein, as against the said C. K. Bailey as an individual, and as against the said C. K. Bailey as executor of the will of C. W. Carpenter, deceased, and as against C. K. Bailey as surviving partner of the firm of Bailey & Carpenter. He denies that said judgment was against the said Clinton H. Carpenter for any sum of money whatever, or that any judgment against the said Clinton H. Carpenter was entered in said cause other than to cut off any supposed right of redemption in said real property in the complaint and in the mortgage described.

He alleges that no personal judgment was taken in said action against any defendant whatsoever, except as against the defendant C. K. Bailey.

He admits and alleges that on the 15th day of May, 1894, under an order of said Superior Court of San Joaquin county previously made in said action of foreclosure, said real property was sold to said O'Connor at sheriff's sale at Stockton, in said county of San Joaquin, by Thomas Cunningham, who was the duly elected, qualified, and acting sheriff of said county, under and by virtue of an execution duly issued out of said court upon said judgment and decree in favor of this defendant, and that thereupon a sheriff's certificate of sale was duly given by

said sheriff to said Myles P. O'Connor as such purchaser, in which it was stated, among other things, that said real property sold as aforesaid was subject to redemption in gold coin of the United States pursuant to the statute in such case made and provided.

He denies that said certificate of sale stated that said property was subject to redemption by any of said defendants in said action of foreclosure, or that there was any other or different statement respecting redemption than that the land "is subject to redemption in gold coin of the United States pursuant to the statute in such cases made and provided."

He denies that any judgment recovered by Amos H. Carpenter against the said Clinton H. Carpenter what-ever ever became a lien upon the said Clinton H. Carpenter's interest or portion of the real property described in the bill of complaint herein, or described in the mortgage from Bailey & Carpenter to this defendant.

He alleges that he has not sufficient information or belief to enable him to answer the allegation that on the 17th day of September, 1894, for a good and valuable consideration, said Amos H. Carpenter sold, assigned, and transferred said judgment of \$12,438 in his favor and against said Clinton H. Carpenter, to your orator, who ever since has been, and now is, the lawful owner and holder thereof; and for that reason he denies that on the 17th day of September, 1894, or at any other time, for a good and valuable consideration, said Amos H. Carpenter sold or assigned or transferred said judgment of \$12,438 in his favor, against said Clinton H. Carpenter, to the

complainant herein, or that he assigned or transferred said judgment to the complainant herein, or that the complainant ever since has been, or is now, the lawful owner or holder thereof.

He alleges that any attempted redemption from said judgment made by the complainant herein was as a volunteer, and not in the capacity of a judgment creditor of said Clinton H. Carpenter, and that the said complainant never at any time had a lien or interest upon, in, or to any portion of the real property in the bill of complaint described, and described in the mortgage from Bailey & Carpenter to this defendant.

He alleges that no redemption or offer to redeem from the said sheriff's sale of said property under said judgment of decree and decree of foreclosure and sale has ever been made by anyone who had any interest in, or lien upon, the property described in the bill of complaint.

He denies that said real property is of the value of \$34,770, or any greater value than \$15,000.

He admits and alleges that the said estate of C. W. Carpenter, deceased, has not been distributed or separated from the partnership assets of Bailey & Carpenter, but is still in the hands of the said C. K. Bailey.

He denies, on his information and belief, that the said C. K. Bailey has nearly or at all wrecked said estate, or rendered the same nearly or at all insolvent through fraud, or mismanagement, or at all, or allowed said property to be sold for the purpose of defrauding the heirs at law of said Carpenter of their inheritance, or for any other purpose whatever, or at all, or for the purpose of

depriving the complainant herein of the benefit of said judgment or lien, or at all, or for any other purpose whatsoever, or that in pursuance of such purpose, or in collusion with said sheriff, purchaser, or others, he caused said redemption to be prevented or refused, with the intent of securing said property again from the purchaser for himself or some member of his family after complainants' or said heirs' right of redemption had expired. And in that behalf this defendant alleges that no agreement of any kind whatsoever has been made between this defendant and the said C. K. Bailey respecting the title to said land, or tending to or intended to deprive the complainant of his interest therein.

He admits that since the execution of the said sheriff's deed he has entered into the possession of the real property therein described, and has leased the same to the said E. F. Bailey in his own right.

He denies, upon his information and belief, that the said C. K. Bailey, as an individual, or as the executor of the will of C. W. Carpenter, deceased, or as the surviving partner of Bailey & Carpenter, or in any other way, claims any interest in said property, either by lease or otherwise, under this defendant or at all.

He denies that the annual rents or profits of said real property are of the value of about \$1,825, or of any greater value than the sum of \$1,000.00; and he denies that any sum above \$666.70 has been taken or appropriated by this defendant or the said Bailey, or either of them, since the 15th day of May, 1894.

He denies that by reason of any wrongful or illegal act of the defendants the complainant is unable to redeem said real property from said mortgage sale, or to enforce any lien which he may have against said Clinton H. Carpenter's portion of said real property, if he has any portion, as the successor in interest to his brother's estate, or to get title or possession of said premises, or that he has been damaged in the sum of \$34,770, or any other sum, the value of said real property at the time of said redemption, or in the further sum of \$1,825, or any other sum of money, the value of the rents and profits thereof since the 15th day of May, 1894, up to the time of the commencement of this action, or in the further sum of two thousand dollars (\$2,000), or any other sum, for attorney's fees incurred herein.

Wherefore, having fully answered, he asks to be hence dismissed with his costs.

WARREN OLNEY,
Solicitor for Defendant O'Connor.

State of California, }
City and County of San Francisco } ss.

Robert Watt, being first duly sworn, deposes and says that he is the agent and attorney in fact of Myles P. O'Connor, one of the defendants herein; that the said Myles P. O'Connor is absent from the city and county of San Francisco, and does not reside therein; that deponent has at all times had charge of the business of the

said O'Connor, in so far as the same relates to the matters and things set out in the bill of complaint and in the answer herein, and the said O'Connor knows nothing thereof, except as he has been informed by this deponent; that this deponent has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ROBT. WATT.

Subscribed and sworn to before me this 24 day of March, 1896.

[Seal]

JAMES L. KING,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Due service of the within answer at Stockton this 26 day of March, A. D. 1896, is hereby admitted.

A. H. CARPENTER & L. W. ELLIOTT,

Solicitors for Complainant.

[Endorsed]: Filed March 27th, 1896. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD MCGORRAY,

Plaintiff,

vs.

MYLES P. O'CONNOR, THOMAS
CUNNINGHAM, C. K. BAILEY, E.
F. BAILEY, ANDREW WOLF, R.
GNEKOW, JOHN JACKSON, T. W.
NEWELL, I. S. BOSTWICK, Wm.
INGLIS, and MOSES MARKS,

Defendants.

Answer of Thomas Cunningham et al.

Now comes the defendants in the above-entitled action, towit, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, and for answer to the bill of complaint filed herein admit and deny as follows:

First.

Deny upon and according to their information and belief that the said complainant, Bernard McGorray is or at

the time of the filing of his bill of complaint herein was, a citizen of Chicago or a citizen of the State of Illinois. But, on the contrary, said defendants aver, charge, and show upon and according to their information and belief that he then was, and ever since has been, a citizen of the State of California.

Second.

Said defendants admit that on the 22d of February, 1884, C. K. Bailey and C. W. Carpenter were general partners in farming and stock raising in the county of San Joaquin, State of California, doing business under the firm name and style of "Bailey & Carpenter."

Third.

Admit that on said 22d day of February, 1884, said Carpenter died, leaving an estate in said county aforesaid, which consisted largely of his individual one-half interest in said partnership property of Bailey & Carpenter.

Fourth.

Admit that at the time charged in said bill of complaint C. K. Bailey filed in the office of the clerk of the Superior Court of said county of San Joaquin a paper purporting to be, and which defendants aver was, the last will and testament of said C. W. Carpenter, deceased; and admit that in and by said last will and testament the bulk of his property was given to the children of said C. K.

Bailey, to the exclusion of his heirs at law, and that said C. K. Bailey was named as executor of said will.

Fifth.

Admit that said alleged pretended will was, by an order of said Superior Court in the matter of said estate, made on the 23d day of February, 1884, duly admitted to probate as the last will and testament of said C. W. Carpenter, deceased, and that said C. K. Bailey was appointed the executor thereof, without bonds as therein provided, and thereupon took the oath of office, and proceeded to act in that capacity, and is still acting as such executor.

Sixth.

Admit that C. W. Carpenter was a bachelor, and that his next of kin and heirs at law were Clinton H. Carpenter, a brother, and other brothers of the same family name within one year from the time of the probate of said will filed in said court, in the matter of said estate, their verified petition in writing, containing their allegations against the validity of said will, and contested the validity of the same on the ground of incompetency of said deceased, and of fraud, menace, and undue influence on the part of said C. K. Bailey, and praying that the probate thereof be revoked and annulled, and that the petitioners be declared the heirs at law of said deceased, and as such entitled to his estate.

Seventh.

Admit that said executor and legatees were made parties defendant in said contest, and appeared in said action by their respective attorneys, and filed answers therein as charged in said bill of complaint.

Admit that two several trials were had in said court and cause before a jury, and that at each trial the jury rendered a verdict against the validity of the will, and that two several decrees were duly made and entered in said court in the matter of said estate, in accordance with such verdicts, declaring said will null and void, and revoking and annulling the probate thereof, and declaring said petitioners the heirs at law of said deceased, and as such entitled to his estate.

Eighth.

Admit and charge and aver that an appeal was taken to the Supreme Court of the State of California from each of said decrees so made and entered as aforesaid, and that said decrees, and each of them were reversed and set aside, and a new trial granted in each instance. And admit and charge that the contest over said will is still pending and undetermined, and has been so pending in said Superior Court since the 21st day of February, 1885, when not on appeal in the Supreme Court as aforesaid.

Ninth.

Said defendants admit that on the day of May, 1893, an agreement was made and entered into by and between the parties hereinafter named to compromise, settle, and determine the matters in contest over the will of the said C. W. Carpenter, and to that end submit the terms of settlement to Frank T. Baldwin. That the parties and persons to said contract, and who signed the same, are L. M. Walker, E. D. Middlekauf, Addie M. Middlekauf, Nettie O. Walker, Hattie M. Bailey, Eddie F. Bailey, C. K. Bailey, and A. H. Carpenter, "attorney in fact for contestants," and none others. That no other contract of settlement, compromise, or arbitration was ever made, and is the contract referred to in paragraph II. of said bill of complaint, and the same is hereby attached to and made a part of this answer, and marked Exhibit "A."

Deny upon and according to their information and belief that all the parties to said agreement appeared before said arbitrator, or presented their case or filed with him their respective claims upon all or any of the matters to be considered or determined by him as such referee.

And, upon like information and belief, said defendants aver, charge, and show, that some of the persons who signed said agreement of arbitration were minors, and, by reason thereof, incompetent to enter into any contract or arbitration of and concerning the matters and things set out in said agreement.

And said defendants further deny that any of the legatees of the will of said C. W. Carpenter duly, or at all, made and entered into any agreement in writing, or otherwise, wherein or whereby the said matters of difference and controversy over said estate or any matter whatever, should be submitted to F. T. Baldwin, as arbitrator, or at all, to determine by an award the value of contestants' interest in said estate, or how much the said Clinton H. Carpenter and other heirs at law of said C. W. Carpenter, or either or any of them, should receive from said estate of Carpenter as their share thereof, or expressly, or at all, stipulated that such reference should in no way affect the controversy then pending over said will, or that the same should continue pending in said court, and not be discontinued or dismissed until the award of such arbitration should be fully performed and carried out.

Deny that said award is in full force or effect, or binding on all or any of the parties interested in said estate.

Admit that on the 30th day of October, 1882, the said firm of Bailey & Carpenter gave a mortgage to Myles P. O'Connor, who is one of the defendants named in this action, as security for the payment of the sum of \$10,000.00 on the real property described in paragraph III of the bill of complaint herein; and admit that said real property so mortgaged as aforesaid, at the time of the execution of said mortgage, was a part of the assets of the firm of Bailey & Carpenter, and a part of the assets of the estate of C. W. Carpenter, deceased; but deny that the said Clinton H. Carpenter, or other heirs, of C. W. Carpenter,

or any of them, are the successors in interest to said real estate of said C. W. Carpenter, or that they, or any of them, are entitled to any part of said real estate as the alleged successor or successors in interest of their late brother, C. W. Carpenter.

Admit that on the 10th day of October, 1888, an action was brought in said Superior Court of the county of San Joaquin by the said O'Connor against C. K. Bailey, Clinton H. Carpenter, and other defendants to foreclose said mortgage; but deny that said action was brought against said Clinton H. Carpenter and the other defendants as one of the successors in interest of the said C. W. Carpenter, deceased. Admit that on the 15th day of March, 1890, a decree of foreclosure and sale was duly made and entered in said court and cause against the defendants herein and in favor of said Myles P. O'Connor, for the amount specified in said bill of complaint herein, to-wit, the sum of \$11,808.74-100, which was the amount found due on said note and mortgage, and costs of suit.

They admit that on the 15th day of May, 1894, under an order of said Superior Court previously made in said action of foreclosure, said real property was sold to the said O'Connor at sheriff's sale by Thomas Cunningham, defendant herein, and sheriff of the county of San Joaquin, under and by virtue of an execution issued out of said court under said judgment and decree in favor of said O'Connor, and that a sheriff's certificate of sale was delivered by said sheriff to said Myles P. O'Connor as such purchaser; but deny that said certificate of sale stated or declared that said real property so sold was sub-

ject to redemption by any of said defendants in said action of foreclosure. But as matter of fact they charge and aver, upon their information and belief and advice of counsel, that the said Clinton H. Carpenter, at the time of such sale under said decree of foreclosure, had no right of redemption, nor has he since had, from such sale.

Admit that at the time charged in the bill of complaint, to-wit, September 15th, 1894, Amos H. Carpenter obtained judgment in the Superior Court of said San Joaquin county against said Clinton H. Carpenter for the sum of \$12,428.00 damages and costs; but deny, upon their information and belief, that on said day, or at any time, said judgment became, or ever was, a lien upon the land, or any part or portion thereof, mentioned and described in paragraph III of said bill of complaint, or ever was a lien upon the alleged interest or portion of the said Clinton H. Carpenter in and to said real property.

That said defendants admit that after the assignment of said judgment, to-wit, on the 18th day of September, 1894, "your orator," in the alleged capacity of a judgment creditor of said Clinton H. Carpenter, claiming to have a lien on said Clinton H. Carpenter's alleged interest or portion of the real property hereinbefore described, tendered to said defendant, Thomas Cunningham, the person and officer as sheriff making the sale of said real property, the sum of \$12,777.05-100 in United States gold coin, the same being the full amount of the purchase price of said realty, together with two per cent per month thereon in addition up to that time, and the amount of all taxes and assessments paid by said purchaser since the

date of said sale for the redemption of said real estate from said mortgage sale; and also handed and produced to said officer a written notice of such redemption, which was signed by said complainant, and stated the capacity in which such attempted redemption was made, together with a description of the property, the judgment and execution under which the sale was made, and the claim that Clinton H. Carpenter was a successor in interest to a portion of said C. W. Carpenter's interest in said property, and one of the defendants in said action of foreclosure, a description of the judgment against Clinton H. Carpenter, the docketing of the same by the clerk of said court, and the alleged lien thereof on said realty, the assignment of such judgment to complainant, together with a copy of the docket of the judgment under which he claimed the right to redeem, which was certified by the clerk of said court, a copy of said assignment from Amos H. Carpenter, verified by said complainant, and his affidavit showing the amount then actually due on such alleged judgment lien, and also filed a duplicate notice of such alleged attempt to redeem in the office of the recorder of said San Joaquin county.

That said defendants admit that the said officer, Cunningham, refused, and ever since has refused, and still continues to refuse, to receive the money for the redemption of said property so tendered as aforesaid.

Defendants admit that at the time charged in the bill of complaint the complainant demanded of said officer a sheriff's deed of said real property such as is usually given in cases to a redemptioner, and admit that at the time

of said demand six months had elapsed from the time of the sale and that no judgment debtor had redeemed or offered to redeem from such sale.

Admit that said sheriff refused, and still continues to refuse, to give a deed thereof to said complainant, and admit that on the 16th day of November, 1894, the said officer, Cunningham, made, executed, and delivered to the said Myles P. O'Connor, as purchaser, a sheriff's deed of said property, in which it was stated and recited that no redemption from said mortgage sale had been made, and said defendants aver and charge that said statements and recitals so made in said deed are true.

Said defendants deny, upon and according to their information and belief, that said real property is of the value of \$34,770.00, or of any greater value than about \$12,800.00.

Defendants deny, upon their information and belief, that the defendant C. K. Bailey is wrongfully carrying on the partnership business formerly existing between Bailey & Carpenter.

Defendants deny that the said C. K. Bailey has nearly wrecked said estate or rendered the same nearly insolvent through alleged fraud or mismanagement, or by any act of said defendant Bailey, or has allowed said property to be sold for the purpose of defrauding the heirs at law of said Carpenter or any one else of their inheritance, or the complainant of the benefit of said supposed judgment lien, or that in pursuance of such alleged purpose, or in collusion with said sheriff, purchaser, and others, or in collusion with any person or persons, he caused

said alleged redemption to be prevented and refused, with the intention of securing said property again from the purchaser for himself or some member of his family after complainants' and said heirs' right of redemption had expired; or that there has been any collusion between the said C. K. Bailey and said sheriff, Cunningham, or with any one else, to prevent any person from redeeming said land from such mortgage sale.

Defendants deny that the annual rents and profits of said real property are of the value of about \$1,825.00, or any greater value than about \$1,000.00.

Deny that by reason of the alleged wrongful acts of said defendants, or any of them, complainant is unable to redeem said real property from said mortgage sale, or to enforce his alleged and supposed judgment lien against said Clinton H. Carpenter's portion of said real property as the supposed successor in interest to his brother's estate, or to get possession or title to said premises. And deny by reason thereof, or at all, said complainant has been damaged in the sum of \$34,770.00, the alleged value of said real estate, at the time of his supposed redemption, or in any sum whatever, or that he has been damaged in the further or other sum of \$1,825.00, the alleged value of the rents and profits thereof since the 15th day of May, 1894, up to the time of the commencement of this suit, or for any time or sum whatever. And deny that he

has been further damaged in the sum of \$2,000.00 or any other sum, for attorney fees made or incurred therein.

Wherefore, said defendants pray that they may be hence dismissed with judgment for their costs in this behalf expended.

DUDLEY & BUCK,
Attorneys for said defendants.

*In the Superior Court of the County of San Joaquin,
State of California.*

In the Matter of the Estate of C. W.

CARPENTER, Deceased.

ABEL F. CARPENTER, et al.,

Contestants,

vs.

C. K. BAILEY et al.,

Proponents.

Whereas, a contest of the will of C. W. Carpenter is now pending and undetermined between the above-named contestants and proponents, and all parties interested in said contest agree that the same be settled, compromised, and terminated and further litigation thereunder prevented.

And whereas, the parties thereto are unable to agree upon the terms of settlement and compromise, and are

willing to submit the question of terms to Frank T. Baldwin for determination.

Now, therefore, in consideration of the premises, and in consideration of and for the purpose of avoiding and preventing further litigation in the matter of the said estate settling and determining the said contest, and in consideration of the mutual promises hereby made; it is hereby agreed by and between the said contestants and proponents, that the said matter shall be referred to Frank T. Baldwin as referee to fix and determine what, under all the circumstances of the case, is a reasonable, just and equitable amount or portion of the said estate to be set over to such contestants in full of all their claims of each and every of them.

He, the said referee, shall ascertain and determine the present net value of said estate; and for such purpose may take such steps as he may deem necessary. He shall fix and determine the value of the land of the said estate per acre and also the amount in money which the contestants are entitled justly and equitably to receive, and shall thereupon deliver his written statement thereof to the attorney of the respective parties to such contest.

The proponents shall have five days from and after the receipt of such statement in which to decide whether they will pay the contestants in land or money. If they elect to pay in land, there shall be made and delivered to said contestants' attorney in fact, A. H. Carpenter, within thirty days from the time of the exercise of such election, deeds of so much of said land as at the valuation fixed and determined by the said referee per acre, shall

make the amount found by the referee as the sum to be paid to such contestants which said land shall be in one parcel, and may be designated by the said referee; provided however, that the land deed shall not include any part of the west half of section 32 in township 3 north, range 9 east, M. D. M., nor any part of the home place, so called.

The said contestants and proponents hereby agree to be bound by the findings of said referee, and the said findings shall be binding upon each and every of them, and said parties may, and they are hereby given the right to, take any and all proper and legal steps and measures to enforce the full and perfect performance thereof, either to obtain the dismissal of said contest on the one part or the specific performance of this agreement upon the other.

That said referee shall be allowed for his services the sum of \$250.00, and such sum in addition thereto as may be required to pay such expenses as may be incurred by him in and about the reference, which sums shall be paid out of the said estate.

None of the parties thereto shall have the right to offer any evidence before the said referee, but such referee, for the purpose of aiding him in determining the true condition and value of the said estate, may call for such statement from either party thereto, and take such evidence as to him shall seem necessary to a proper determination of the question hereby submitted to him.

In determining the amount to be allowed to the contestants, and in considering the claims against the said

estate, the referee shall also take into consideration the fact that a certain claim of C. K. Bailey, filed and approved in said estate for a note made by deceased in his lifetime, is contested for the same reasons and on the same grounds as made to the will.

In witness whereof, the said contestants and proponents have hereunto affixed their hands and seals, this day of May, 1893.

It is further stipulated and agreed, that if either or any of said parties refuse to conform to or abide by the decision of said referee, or carry out the provisions thereof, a decree may and shall be entered in the matter of the contested will herein, against the parties so refusing to abide by or carry out the decision of the said referee, and that said decree shall be entered against the party or parties so refusing the same as though said contest had been tried by a jury, and a verdict rendered against said party or parties so refusing to abide by or carry out said award.

Dated May , 1893.

L. M. Walker.

E. D. Middlekauf.

Addie M. Middlekauf.

Nettie O. Walker.

Hattie M. Bailey

Eddie F. Bailey.

C. K. Bailey.

A. H. CARPENTER,

Attorney in Fact for Contestants.

This agreement is signed by the said A. H. Carpenter upon the condition that the original contract shall be carried out, namely: That only the legal claims against said estate shall be considered, and the determination of the referee as to such legality shall be final and conclusive; that said referee shall designate the land to be received by the contestants; and that said Carpenter shall receive two span of good driving horses to be taken at appraised value as a part of such award.

May 24th, 1893.

A. H. CARPENTER.

Those horses that C. K. Bailey is in the habit of driving shall not be chosen by the said Carpenter.

State of California, }
County of San Joaquin. } s.

Thomas Cunningham, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are therein stated on information or belief, and as to those matters he believes it to be true.

THOS. CUNNINGHAM.

Subscribed and sworn to before me this 18th day of March, 1896.

[Seal]

C. W. MILLER,

Notary Public in and for said State and County.

Due service of the within answer is hereby admitted this 26th day of March, 1896.

A. H. CARPENTER and L. W. ELLIOTT,
Atty. for Complainant.

[Endorsed]: Filed Mch. 30th, 1896. W. J. Costigan,
Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit Northern District of California.

IN EQUITY.

BERNARD MCGORRAY,
Complainant,

vs.

MYLES P. O'CONNOR, THOMAS CUN-
NINGHAM, C. K. BAILEY, E. F.
BAILEY, ANDREW WOLF, R. GNE-
KOW, JOHN JACKSON, T. W. NEW-
ELL, I. S. BOSTWICK, WILLIAM
INGLIS and MOSES MARKS,
Defendants.

Replication to Answers.

The replication of Bernard McGorray, the above-named complainant, to the several answers of Myles P. O'Connor

and Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, G. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, William Inglis, and Moses Marks, defendants.

This replicant, saving and reserving to himself now and at all times, hereafter all and all manner of benefits and advantage of exception which may be had and taken to the manifold insufficiencies of the said answers, for replication thereto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that said answers of said defendants are uncertain, untrue, and insufficient to be replied unto by replicant without this; that any other matter or thing whatsoever, in the said answers contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the replicant is and will be ready to aver, maintain, and prove, as this Honorable Court shall direct, and humbly prays as in and by his said bill he hath already prayed.

L. W. ELLIOTT,
A. H. CARPENTER,
Solicitors for Complainant.

Received a copy of the within replication this 31st day of March, 1896.

DUDLEY & BUCK,
Attys. for Defendants Cunningham et al.

Sent a copy of the within to Warren Olney, by mail,
this 31st day of March, 1896.

A. H. C.

[Endorsed]: Filed April 1st, 1896. W. J. Costigan,
Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

BERNARD McGORRAY,

Complainant,

vs.

M. P. O'CONNOR et al.,

Respondents.

No. 12022.

Enrollment.

The complainant filed his bill of complaint herein on
the 6th day of December, 1894, which is hereto annexed.

A subpoena to appear and answer in said cause was
thereupon issued, returnable on the 4th day of February,
A. D. 1895, which is hereto annexed.

The respondents Cunningham et al appeared herein on
the 4th day of February, 1895, by Messrs Dudley & Buck,
Esqs., their solicitors.

On the 4th day of March, 1895, a demurrer was filed herein, which is hereto annexed.

On the 5th day of November, 1895, an alias subpoena ad respondendum was issued herein, returnable on the 2d day of December A. D. 1895, which is hereto annexed.

The respondent M. P. O'Connor appeared herein on the 2nd day of December, 1895, by Warren Olney, Esq., his solicitor.

On the 2d day of December, 1895, a demurrer of M. P. O'Connor was filed herein which is hereto annexed.

On the 2d day of March, 1896, an order overruling the demurrers was made and entered herein, a copy of which is hereto annexed.

On the 27th day of March, 1896, the answer of respondent M. P. O'Connor was filed herein, which is hereto annexed.

On the 30th day of March, 1896, the answer of respondents Cunningham et al was filed herein, which is hereto annexed.

On the 1st day of April, 1896, a replication to the answers of M. P. O'Connor and Cunningham et al was filed herein, which is hereto annexed.

Thereafter on the 12th day of April, 1897, a final decree was signed, filed, and entered herein, in the words and figures following, viz:

*In the Circuit Court of the United States, Ninth Judicial
Circuit, Northern District of California.*

IN EQUITY.

BERNARD MCGORRAY,

Plaintiff,

vs.

MYLES P. O'CONNOR, THOMAS
CUNNINGHAM, C. K. BAILEY, E.
F. BAILEY, ANDREW WOLF, R.
GNEKOW, JOHN JACKSON, T. W.
NEWELL, I. S. BOSTWICK, WIL-
LIAM INGLIS, and MOSES MARKS.

Defendants.

March term,
1897.

Final Decree.

This cause came on to be heard upon the bill of complaint filed herein and the respective answers of the defendants, and was argued by counsel and submitted to the Court for its decision and thereupon on this 12th day of April, 1897, upon consideration thereof it was ordered, adjudged, and decreed as follows, to-wit:

That the plaintiff, Bernard McGorray, is not entitled to any of the relief sought for in his said bill of complaint, and said bill of complaint is hereby dismissed.

It is further ordered, adjudged, and decreed that the defendants and each of them do have and recover his costs and disbursements in this behalf expended taxed at \$18.00.

Dated April 12th, 1897.

WM. W. MORROW,
Judge.

[Endorsed]: Filed and entered April 12, 1897. W. J. Costigan, Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

BERNARD McGORRAY,

Plaintiff,

vs.

M. P. O'CONNOR et al.,

Defendants.

Memorandum of Costs.

Disbursements of Defendant O'Connor.

Clerk's fees	\$10
Reporter's fees	6 add by Clk.
Notary's fees	2

Total	\$12
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Taxed at	\$18
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W. J. COSTIGAN,

Clerk.

United States of America, }
 Northern District of California, } ss.
 City and County of San Francisco. }

Warren Olney, being duly sworn, deposes and says that he is solicitor for the defendant O'Connor in the above-entitled cause, and as such is better informed relative to the above costs and disbursements than the said O'Connor; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

WARREN OLNEY.

Subscribed and sworn to before me this 14th day of April, A. D. 1897.

W. J. COSTIGAN,

Clerk.

Clerk U. S. Circuit Court, Northern District of California.

To A. H. Carpenter,

You will please take notice that on Thursday, the 15th day of April, A. D. 1897, at the hour of 11 o'clock A. M. defendant O'Connor will apply to the clerk of said court, to have the within memorandum of costs and disbursements taxed pursuant to the rule of said court in such case made and provided.

WARREN OLNEY,

Solicitor for Defendant O'Connor.

Service of within memorandum of costs and disbursements, and receipt of a copy thereof, acknowledged this 15th day of April, A. D. 1897.

A. H. CARPENTER,
Attorney for Complainant.

[Endorsed]: Filed this 15th day of April, A. D. 1897.
W. J. Costigan, Clerk.

Certificate to Enrollment.

Whereupon, said pleadings, subpoenas, copy of order, final decree and a memorandum of taxed costs are hereto annexed, said final decree being duly signed, filed, and enrolled pursuant to the practice of said Circuit Court.

Attest, etc.

[Seal]

W. J. COSTIGAN,
Clerk.

[Endorsed]: Enrolled papers. Filed April 12th, 1897.
W. J. Costigan, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
in and for the Northern District of California.*

IN EQUITY.

BERNARD MCGORRAY,

Complainant,

vs.

M. P. O'CONNOR et al.,

Respondents.

No. 12,022.

In Equity. Suit to obtain a decree canceling and declaring void a certain sheriff's deed to land sold upon foreclosure of a mortgage; to allow the complainant to redeem as a judgment creditor; and to direct the sheriff to execute and deliver a deed of the property to the complainant, etc.

L. W. ELLIOTT and A. H. CARPENTER, Solicitors for
Complainant.

Messrs. OLNEY & OLNEY, and DUDLEY & BUCK, Soli-
citors for Respondents.

Opinion.

MORROW, District Judge.—In this action the complainant seeks to obtain the decree of this Court, canceling and declaring null and void a certain deed executed

and delivered by the respondent, Thomas Cunningham, as sheriff of San Joaquin County, to the respondent, Myles P. O'Connor, on the 16th of November, 1894, conveying to O'Connor the lands and premises described as the E. 1-2 and NW. 1-4 of the NE. 1-4 of section 5, T. 2 N., R. 8 east, and the SE. 1-4 and the E. 1-2 of the SW. 1-4 of section 32, T. 3 N., R. 8 east, Mount Diablo base and meridian, which land and premises were sold by the sheriff under and by virtue of a decree of foreclosure of a mortgage and order of sale made by the Superior Court of San Joaquin county on the 15th of May, 1894. The complainant also seeks the further decree of the Court, that he be allowed to redeem the land and premises from such sale in the character of a judgment creditor of one Clinton H. Carpenter, and that the sheriff make a deed of the property and deliver it to the complainant.

The case has been submitted upon the motion of both parties for a judgment upon the pleadings. It appears, from the complaint that on the 30th day of October, 1882, C. K. Bailey and C. W. Carpenter, doing business as co-partners in San Joaquin county as farmers and stock-raisers under the name of Bailey and Carpenter, gave a mortgage on the premises above described to the defendant Myles P. O'Connor as security for the payment of \$10,000.

On January 22d, 1884, C. W. Carpenter died, leaving an estate consisting largely of his half interest in the partnership property. He was an unmarried man, and, in a document purporting to be his last will and testament, he gave the bulk of his property to the children of C. K.

Bailey, his surviving partner, to the exclusion of his heirs at law. This will was admitted to probate and Bailey was appointed executor. The will was contested by Clinton H. Carpenter, a brother of the deceased, with whom, it appears, other brothers were associated, but their names are not given in the bill. The executor and legatees were defendants. Two trials were had before a jury, each trial resulting in favor of the contestants, and on each verdict the Superior Court entered a decree, revoking the probate of the will and declaring the petitioners in such contest the heirs at law of the deceased.

From each of the verdicts and decrees the executor and legatees appealed to the Supreme Court of the State of California, and said decrees were reversed and new trials granted. The contest over the will is still pending in the Superior Court of San Joaquin county. On the 10th of October, 1888, Myles P. O'Connor brought suit in the Superior Court of San Joaquin county against C. K. Bailey and Clinton H. Carpenter, as one of the alleged successors in interest of C. W. Carpenter, deceased, and other defendants, to foreclose the mortgage, and, on the 15th day of March, 1890, a decree of foreclosure and sale was made and entered in the Superior Court for the sum of \$11,808.74 and costs. In the bill, it is alleged that this decree was "made and entered in said court and cause against C. K. Bailey and Clinton H. Carpenter and other defendants." On the 15th day of May, 1894, under the order of Court in the foreclosure suit, the mortgaged property was sold to the defendant Myles P. O'Connor at sheriff's sale

by the defendant Cunningham, and the sheriff's certificate of sale was delivered to O'Connor, and, on November 16th, 1894, the sheriff delivered to him the deed of conveyance which it is the object of this action to declare null and void and of no effect.

It appears, further, that, on the 15th day of September, 1894, Amos H. Carpenter recovered a judgment in the Superior Court of San Joaquin county against Clinton H. Carpenter for the sum of \$12,438 damages and costs, and, on the same day, this judgment was docketed by the clerk of the court, so that it became a lien upon the property of Clinton H. Carpenter. On the 17th day of September, 1894, Amos H. Carpenter sold and transferred this judgment to the complainant in the present suit. After this assignment, and on the 18th of September, 1894, the complainant, in the capacity of a judgment creditor of Clinton H. Carpenter and claiming a lien on the interest of the latter in the mortgaged premises, tendered to the sheriff of San Joaquin county the sum of \$12,777.05 for the redemption of the real estate from the mortgage sale. The sheriff refused the money from the complainant for the redemption of the property and refused to give him a deed therefor.

It is further alleged in the bill that, on the 24th day of May, 1894, Clinton H. Carpenter and other heirs at law of the deceased and the executor and legatees under the will entered into an agreement to arbitrate the matters in difference over said estate, and that such matters should be submitted to an arbitrator, who should determine, in his award, the value of contestants' interest in

said estate and how much the said Clinton H. Carpenter and other heirs at law of the deceased should receive from said estate as their share thereof; that such reference should in no way affect the controversy then pending over the will, but the same should continue pending in court and not be discontinued or dismissed until the award of such arbitrator should be fully performed and carried out; that the reference was made and the parties appeared before the arbitrator, who made his award, in which it was decreed and determined that the interest of Clinton H. Carpenter and other heirs in said estate was of the value of \$11,256.24, and that they were entitled to receive that sum from the estate of the deceased; that the award has never been carried out or performed and is in full force and effect and binding upon all the parties interested in said estate.

To this complaint, a demurrer was interposed on the ground that the complainant had not stated such a cause of action as entitled him to the relief for the bill. The demurrer was argued before Judge McKenna and overruled. It is said that it was intimated from the bench that, but for the allegations of the bill that a judgment had been entered against Clinton H. Carpenter in the foreclosure proceedings, the demurrer would have been sustained. However that may be, an answer has been filed by the respondent O'Connor, in which it is denied that the judgment was against Clinton H. Carpenter for any sum of money whatsoever, or that any judgment against him was entered in the cause other than to cut off any supposed right of redemption of the real property described

in the mortgage, and that no personal judgment was taken in said action against any of the defendants except as against the defendant C. K. Bailey.

The answers of the respondents are sworn to and were filed March 26th, 1896, and, on the 1st of April, 1896, complainant filed his replication. The answers of the respondents are direct and positive in their denials of the material allegations of the bill, and as the complainant did not waive an answer under oath and as no testimony has been taken in support of the bill, the allegations of the answer, responsive to the bill, must be taken as true. (*Slessinger v. Buckingham*, 8 Saw. 470; *Satterfield v. Malone*, 35 Fed. Rep. 446; *Walcott v. Watson*, 53 Fed. Rep. 429; *Vigel v. Hopp*, 104 U. S. 441; *Morrison v. Durr*, 122 U. S. 518; *Southern Development Co. v. Silva*, 125 U. S.)

An effort appears to have been made by the complainant to avoid the effect of the answer by a motion to strike out certain portions of it, but notice of this motion was not given until June 29th, 1896, nearly three months after the replication had been filed and only two days before the expiration of the time for taking testimony as provided by Rule 69 of the Equity Practice. This motion has since been considered and denied, not only because it had not been made at the proper stage of the proceedings, but for the reason that the allegations proposed to be struck out were responsive to the allegations of the bill. But, aside from any question of pleading, the controlling question in the case is this, Was the complainant, in September, 1894, as the judgment creditor of Clinton H. Carpenter, entitled to redeem the land in question from the mort-

gage sale? The right of redemption, in this State, is given by statute and is conferred upon two classes: 1. The judgment debtor, or his successor in interest in the whole or any part of the property; 2. A creditor having a lien by judgment or mortgage on the property sold, or in some share or part thereof subsequent to that on which the property was sold. (Section 701, Code of Civil Procedure.) Can complainant's claim be maintained under the first subdivision of this statute? The mortgaged property was the partnership property of the firm of Bailey & Carpenter, and, under the law of this State, upon the death of one partner, the possession of the partnership interests vests exclusively in the surviving partner, who has the absolute power and control and disposition of the assets of the partnership. (Section 1585 Code Civil Proc.; *Allen v. Hill*, 16 Cal. 113, 118; *Theller v. Such*, 57 Cal. 447, 459.) It appears, from the bill, that the estate of Carpenter has not been distributed or separated from the partnership assets of Bailey & Carpenter, but is still in the hands of C. K. Bailey who, as surviving partner, still continues the partnership business. This fact alone is sufficient to dispose of any supposed right of redemption having thus far descended to the heirs of Carpenter. In *Robertson v. Burrill*, 110 Cal. 568, a partnership business was formed by Robertson & Burrill, for the purpose of engaging in the business of raising, buying, and selling stock, transacting a general farming business and dealing in real estate and other property. Robertson died and the business was continued by Burrill, the surviving partner, until his death. The heirs of Robertson then brought an action

against the administration of the estate of Burrill to compel an accounting, and for the appointment of a receiver to take charge of the Burrill estate, as being partnership property. A demurrer to the complaint in the court below was sustained. On appeal to the Supreme Court, the judgment was affirmed. In speaking of the right of the heirs to maintain an action for an accounting and settlement of a partnership between the decedent and a surviving partner, the Supreme Court said: "Plaintiffs are not the proper parties to maintain this action, and they have not the legal capacity to do so. While, in a sense, they are beneficiaries of the trust which resulted by the death of their father, the fulfillment of which was imposed upon the surviving partner, yet there were certain intermediate steps and processes necessary to be taken and followed before their beneficial interests could be reduced to possession. And it is these necessary processes which the action under consideration entirely ignores. For there was another trust intervening in time and right and duties between the close of the surviving partner's trust and their enjoyment of its fruits. It is true that as heirs of their father the title to his property, real or personal, vested in them, but their title did not carry with it the right to immediate enjoyment. The rights and duties of the administrator of their father's estate interposed and intervened. The administrator, also, is a trustee with well-defined duties, among the first of which is that of collecting the assets of the estate and paying its just debts after due notice to creditors. The heirs' title is subject to the

performance by the administrator of all his trusts, and they finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator. . . . Whether the partnership assets consist of real or personal property, or both, is quite immaterial, since in every case it is made the duty of the surviving partner to account with the personal representative."

It is clear that, under the law as thus established in this State, the complainant has not succeeded to such an interest of the judgment in the whole or any part of the property as entitle him to redeem under the statute.

This determination disposes of the question of a judgment-lien, under the second subdivision of the statute, obtained by Amos H. Carpenter in September, 1894, on the property of Clinton H. Carpenter. As the latter had not succeeded to any interest in the mortgaged premises, either directly or by the terms of the award in his favor, there was nothing to which the judgment lien could attach.

A decree will be entered in favor of the respondents, and for their costs.

[Endorsed]: Filed April 12, 1897. W. J. Costigan, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Judicial Circuit,
Northern District of California.*

BERNARD MCGORRAY,

Complainant,

vs.

MYLES P. O'CONNOR, et al.,

Defendants.

Complainant's First Bill of Exceptions.

Be it remembered that the respondents, on the 27 day of March, 1896, filed their respective answers herein, and on the 1st day of April, 1896, the complainant filed his replication to the respective answers and on the 14th day of July, 1896, the respondents served a notice upon the complainant that at the next calling of the term calendar they should move to set the cause down for trial upon bill and answers, and on the 17th day of July, 1896, the complainant in the above-entitled action filed in this Court, and duly served on the attorneys for each and all of the defendants herein, a notice of motion to strike the answers of said defendants from off the files of said cause, on the ground that said answers, and each of them, were not accompanied by certificate of counsel that it was well founded in point of law as required by Rule 10 of the Rules of Practice of this Court, which reads as follows to-

wit: "No demurrer or special plea or answer to a complaint shall be allowed to be filed, unless accompanied by a certificate of counsel that, in his opinion, it is well founded in point of law."

That said notice of motion is in words and figures as follows, to -wit:

[Title of Court and Cause.]

"To the Defendants, and Warren Olney, and Dudley & Buck, their Attorneys:

You will please take notice that upon the calling of the general term calendar next after this date, or as soon thereafter as the matter can be heard, the complainant will move the above-named court to strike from off the files of said cause and court the answer of Myles P. O'Connor, and the answer of Thomas Cunningham and others, and also for an order of Court allowing a default to be entered against each and all of the defendants herein for want of an answer.

Said motion will be made upon the ground that neither of the two above-named answers were verified as required by Rule 59 of this court, and on the further ground that said answers, and each of them, were not accompanied by a certificate of counsel that it was well founded in point of

law, as required by Rule 10 of the Rules of Practice of this court.

Said motion will be made and based upon the papers, files, and records of said case.

Dated July 16, 1896.

L. W. ELLIOTT, and
A. H. CARPENTER,
Solicitors for Complainant."

That thereafter, on the 3d day of August, 1896, said motion came on regularly for hearing before the Hon. Joseph McKenna, as Judge of said court, and the same was argued by counsel for the respective parties to said action, and said motion was thereupon submitted to the Court for decision, and the same was denied by the Court. And the following is a copy of the order made by the said Court in that behalf as entered in the clerk's record thereof, to-wit:

[Title of Court and Cause.]

"Monday, August 3d, 1896.

"In this cause, after argument by counsel for the respective parties, it was ordered that the motion to strike from files the answers of defendants O'Connor and Cunningham be and hereby are denied, with leave to said defendants to further verify their answers and add certificates if so advised."

That said defendants, and each of them, neglected and refused to avail themselves of the Court's said permission to file answers as provided in the aforesaid order, and on

the 27th day of March, 1897, the said complainant filed in this court and on the 26th day of March, 1897, duly served on the attorneys for each and all of the defendants herein, a second notice of motion, to strike said pretended answers from off the files of said cause on the same grounds as specified in the motion last above named, and on the additional ground that said defendants had not, nor had any or either of them, availed themselves of the permission theretofore granted by the Court by filing answers which should conform to said rules of Court; that said notice of motion is in words and figures as follows, to-wit:

[Title of Court and Cause.]

“To the Defendants, and Warren Olney, and Dudley & Buck, their Attorneys:

“You will please take notice that on Wednesday, the 31 day of March, 1897, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-named Court, in the city and county of San Francisco, State of California, the complainant herein will move the above-named court to strike from off the files of said cause the answer of Myles P. O'Connor, and the answer of Thomas Cunningham et al., and also for an order of Court allowing a default to be entered against each and all of the defendants herein, for want of an answer.

Said motion will be made upon the ground that neither of the above-named answers were accompanied by a cer-

tificate of counsel that said answers or either of them were well founded in point of law as required by rule 10 of the Rules of Practice of this court, and on the further ground that said defendants have not, nor has any or either of them, filed new answer or answers conforming to the rules of this court, in accordance with the order of court heretofore made herein, on or about the 3d day of Aug., 1896. Said motion will be made and based upon the affidavit of A. H. Carpenter, hereto attached and served, and upon the papers, files, and records of said case.

L. W. ELLIOTT, and
A. H. CARPENTER,
Solicitors for Complainant.

State of California, }
County of San Joaquin. } ss.

A. H. Carpenter, being duly sworn, says that he is one of the solicitors for the complainant in the above-entitled action; that on or about the 3d day of August, 1896, the complainant herein moved the above-named Court to strike from off the files of this cause each and all of the pretended answers filed herein, on the ground that said answers, and each of them, did not conform with the requirements of the rules of this court, because they were not accompanied by a certificate of counsel that said answers were well founded in point of law; that said motion was temporarily denied by said Court, and leave was granted said defendants, and each of them, to file an-

swers which should conform to the requirements of the rules of said Court; that said defendants, and each and all of them, have failed and neglected to comply with said order, and there are now no valid or lawful answers on file in this cause; that said pretended answers were wrongfully filed and in direct violation of the Rules of Practice of this court as provided in Rule 10 thereof.

A. H. CARPENTER.

Subscribed and sworn to before me this 25th day of March, 1897.

[Seal]

C. L. FLACK,

Notary Public in and for said County and State."

That thereafter, on the 31st day of March, 1897, said motion came on regularly for hearing before the Hon. W. W. Morrow, acting Judge of said court, and the same was argued by counsel for the respective parties to said action, and was submitted to the court for decision. The Complainant read to the Court the aforesaid affidavit of A. H. Carpenter, and urged all the grounds set forth in the foregoing notices for the granting of said motion. The defendants objected to the granting of complainant's motion on the ground that said Rules of Practice did not require any certificate of counsel to an answer on the merits. The Court thereupon denied said motion to strike the answers from off the files of said case, but gave no reason for the decision; to which ruling of the Court the counsel for the complainant then and there excepted; that said order of Court as entered in the clerk's records is in words and figures as follow, to-wit:

[Title of Court and Cause.] No. 12022.

“Wednesday, March 31, 1897.

“Complainant’s motion filed herein on the 27th instant, to strike the answers of said defendants, O’Connor and Cunningham et al. from the files, and for default, was submitted to the Court, and it is ordered that the said motion be and hereby is denied, and complainant allowed an exception to this ruling.”

Be it remembered that on the 29th day of June, 1896, the complainant herein filed in this court, and duly served on the attorneys for each and all of the defendants, a notice of motion to strike out certain portions of the answers of the defendants O’Connor and Cunningham and others, on the ground that such portions were, and each and every part thereof was, sham, redundant, and conclusions of law, as more fully appears in the notice thereof, which is in words and figures as follows, to wit:

[Title of Court and Cause.]

“To the Defendants and Warren Olney, and Dudley & Buck, their Attorneys:

“You will please take notice that on Monday, the 6 day of July, 1896, at the hour of 11 o’clock A. M. of said day, or as soon thereafter as counsel can be heard at the courtroom of the above-named court, in the city and county of San Francisco, State of California, the above-named complainant will move said Court for judgment on the plead-

ings, and also to strike out from the answer of Myles P. O'Connor all of the following allegations, to-wit: All that portion of said answer found on lines 22 to 27, inclusive, of page 8; all on lines 12 to 17, inclusive, page 9 thereof; all on line 30 of page 9 commencing with the word 'he,' and all on lines 1 to 8, inclusive, page 10; all on lines 1 to 6, inclusive, page 11 thereof; all on lines 7 to 28, inclusive, page 11 thereof; all on lines 1 to 5, inclusive, page 12 thereof; and to strike out from the answer of Thomas Cunningham and others all of the following words and allegations, to-wit, all on lines 12 and 13, page 2, of said answer commencing with the word 'and' and said line 12; all on line 22, page 4, to and including line 22 on page 5 thereof; all on lines 3, page 6, commencing with 'but,' to and including line 9 on page 6; all of line 6 to 10, inclusive, page 7 thereof; all on line 16, page 7, commencing with the word 'but,' up to and including line 22 same page.

Said motion will be made on the ground that all of the allegations above described and referred to are, and each of them is, sham, irrelevant, and redundant, and of such a character that said defendants cannot be heard to urge the same as a defense herein, having no interest in the matter, save the amount of the mortgage note, and will be based on the papers, files, and records of said cause.

L. W. ELLIOTT,

A. H. CARPENTER,

Attorneys for Complainant."

That said motion came on regularly for hearing on said 6th day of July, 1896, and was, without any objection or exception being made thereto, continued by the Court to the 3d day of Aug., 1896, when counsel for the respective parties duly appeared in court and argued said motion on its merits, and, by order of Court, said motion and matters therein contained were submitted to the Court on briefs to be filed thereafter; that said order of Court, as entered in the clerk's records, is in words and figures as follow, to-wit:

[Title of Court and Cause.] No. 12022.

“Monday, Aug. 3d, 1896.

“It is further ordered that the motion to set the cause for hearing upon bill and answer be, and hereby is, denied, and that the motion to strike out parts of the answers of defendants O'Connor and Cunningham, and the motion for judgment on the pleadings be, and they are, submitted upon briefs; complainant to file brief within 20 days, defendant to file brief within 20 days thereafter, and complainant to file reply brief within 10 days thereafter.”

That thereafter said order of submission was revoked by the Court, and said motion, at the request of counsel for the defendants, came on for hearing on its merits on the 31st day of March, 1897, before the Hon. W. W. Morrow, acting Judge of said court, and the same was argued by counsel for the respective parties to said action, and was submitted to said Court for decision. That complainant urged that said motion be granted on the grounds

stated in the aforesaid notice. The Court thereupon denied said motion and each and every part thereof; to which opinion and ruling of the Court the counsel for the complainant then and there excepted. That said order of Court, as entered in the clerk's record, is in words and figures, to-wit:

[Title of Court and Cause.] No. 12022.

“Wednesday, March 31, 1897.

“It is ordered that the order of the 15th instant, submitting complainant's motion to strike out parts of answers of defendants, and for judgment on the pleadings herein be, and the same is hereby, vacated and set aside, complainant's motion to strike out portions of the answer of defendant O'Connor, and to strike out portions of the answer of defendants Cunningham, et al., was thereupon argued by A. H. Carpenter, Esq., for complainant, and by Warren Olney, and W. L. Dudley, Esqs., for the defendants, and submitted to the Court; and the same having been considered it was ordered that said motion be, and hereby is, denied, and complainant allowed an exception to the foregoing ruling.

Assignment of Errors.

The complainant makes, assigns, and relies on the following errors, to-wit:

I.

It was error to deny the complainant's second motion to strike defendants' answers, and each of them, from off the files of said cause.

2.

It was error to deny the complainant's motion to strike out the said several portions from the answers of the said defendants.

The foregoing constitute the complainant's bill of exceptions to be used on appeal herein; and complainant prays that the same may be allowed and certified as correct.

L. W. ELLIOTT,
A. H. CARPENTER,
Solicitors for Complainant.

The foregoing bill of exceptions is hereby allowed and settled as correct.

Dated April 27th, 1897.

WM. W. MORROW,
Judge.

[Endorsed]: Filed April 27th, 1897. W. J. Costigan,
Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD McGORRAY,

Complainant,

vs.

MYLES P. O'CONNOR et al.,

Defendants.

Complainants' Second Proposed Bill of Exceptions.

Be it remembered that on the third day of August, 1896, when the pleadings herein were undetermined and the issues raised by the bill of complaint, and the answers of the defendants were unsettled, by reason of complainant's motion, then pending on its merits, to strike said answers, and each and all of them, from off the files of said cause, and by reason of a second motion by complainant, then pending on its merits, from judgment on the pleadings, and by reason of a third motion by complainant then pending on its merits to strike out large portions of said answers and each of them, on the ground that such portions were sham, redundant, and conclusions of law, the defendants O'Connor and Cunningham, and others, moved the Court, on motion duly made and given to set said

action for hearing on bill and answers. Said notice of motion is in words and figures as follows, to-wit:

[Title of Court and Cause.]

"The complainant and his solicitors will please take notice that upon the calling of the general term calendar next after this date we shall move the Court to set down the above-entitled action for hearing upon the bill and the answers of the respondents thereto. Said motion will be made upon the ground that the complaint has taken no evidence within the time allowed by the rule of the court or by law, and that said cause is ready for submission upon the bill and answers thereto.

Dated July 13, 1896.

WARREN OLNEY,
DUDLEY & BUCK,
Solicitors for Respondents.

That said motion came on regularly for hearing before the Hon. Joseph McKenna, Judge of said court, and the same was argued by counsel for the respective parties to the said action, and was thereupon submitted to said Court for decision, and the same was denied by the Court on the ground that the issues in the case were unsettled.

That said order of Court, as entered in the clerk's records, is in words and figures as follows, to-wit:

[Title of Court and Cause.] No. 12022.

“Monday, August 3, 1896.

“In this cause, after argument by counsel for the respective parties, it was ordered that the motions to strike from the files the answers of the defendants O'Connor and Cunningham be, and hereby are, denied, with leave to said defendants to further verify their answers and add certificates if so advised. It is further ordered that the motion to set the cause for hearing upon the bill and answers be, and hereby is, denied, and that the motion to strike out parts of the answers of defendants O'Connor and Cunningham, and the motion for judgment on pleadings be, and they are, submitted upon briefs; complainant to file brief within 20 days, defendants to file briefs within 20 days thereafter, and complainant to file reply brief within 10 days thereafter.”

That thereafter, on the 31st day of March, 1897, while said issues were unsettled and undetermined by reason of the pendency of complainant's said motions hereinbefore referred to and hereinafter set forth in full, the defendants herein, without permission or leave of Court, renewed, under precisely the same circumstances as existed in the first instance, their said motion to set said action for hearing on bill and answers which had already been denied as hereinbefore set forth, said notice of motion was duly made and served, and is in the words and figures as follows, to-wit:

[Title of Court and Cause.]

"The complainant and his solicitors will please take notice that the trial of the above-entitled action was at the beginning of this term set down for the 23d day of March, 1897.

"You will further take notice that upon the calling of said case for trial the defendants will insist upon the submission of the case upon the bill and answers on file herein, and that the Court then and there deny the complainant's motion to strike out portions of the answer, and for judgment on the pleadings. Please govern yourselves accordingly.

"Dated March 17th, 1897.

"WARREN OLNEY,

"OLNEY & OLNEY,

"Solicitors for Defendant M. P. O'Connor.

"DUDLEY & BUCK,

"Attorneys for all the Defendants except O'Connor."

[Endorsed]: Filed March 31st, 1897. W. J. Costigan,
Clerk.

That the complainant's said three motions (pending on their merits at the time the defendants' first and second motion to set said cause for hearing on bill and answers were made), including notices thereof which were duly made and filed and served upon the attorneys for each and all of said defendants are in the words and figures as follows, to-wit:

[Title of Court and Cause.]

“To the Defendants and Warren Olney, and Dudley & Buck, their Attorneys:

You will please take notice that on Monday, the 6th day of July, 1896, at the hour of 11 o'clock, A. M., of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-named court, in the city and county of San Francisco, State of California, the above-named complainant will move said Court for judgment on the pleadings and also to strike out from the answer of Myles P. O'Connor all of the following allegations, to-wit: All that portion of said answer found on lines 22 to 27, inclusive, of page 8; all on lines 12 to 17, inclusive, page 9 thereof; all on line 30 of page 9, commencing with the word 'he,' and all on lines 1 to 8, inclusive, page 10; all on lines 1 to 6, inclusive, page 11 thereof; all on lines 7 to 28, inclusive, page 11 thereof; all on lines 1 to 5, inclusive, page 12 thereof; and to strike out from the answer of Thomas Cunningham and others all of the following allegations and words to-wit: All on lines 12 and 13, page 2 of said answer, commencing with the word 'and' on said line 12; all on line 22, page 4, to and including line 22, on page 5 thereof; all on line 3, page 6, commencing with 'but,' to and including line 9 on page 6; all on line 6 to 10, inclusive, page 7 thereof; all on line 16, page 7, commencing with the word 'but,' up to and including line 22, same page.

“Said motion will be made on the ground that all the allegations above described and referred to are, and each

of them is, irrelevant and redundant, and of such a character that the said defendants cannot be heard to urge the same as a defense herein, having no interest in the matter, save the amount of the mortgage note, and will be based upon the files, papers, and records of said cause.

“L. W. ELLIOTT,

A. H. CARPENTER,

“Attorneys for Complainant.”

[Endorsed]: Filed June 29th, 1896. W. J. Costigan,
Clerk.

[Title of Court and Cause.]

“To the Defendants, and Warren Olney and Dudley &
Buck, their Attorneys:

You will please take notice that on Wednesday, 31st day of March, 1897, at the hour of 10 o'clock, A. M., of said day, or as soon thereafter as counsel can be heard at the courtroom of the above-named court, in the city and county of San Francisco, State of California, the complainant herein will move the above-named court to strike from off the files of said cause the answer of Myles P. O'Connor, and the answer of Thomas Cunningham and others, and also for an order of Court allowing a default to be entered against each and all of the defendants herein for want of an answer. Said motion will be made upon the ground that neither of the above-named answers were accompanied by a certificate of counsel that said answers or either of them were well founded in point of law as required by Rule 10 of the Rules of Practice of this court,

and on the further ground that said defendants have not, nor has any or either of them, filed new answer or answers conforming to the rules of this court in accordance with the order of Court heretofore made herein on or about the 3d day of August, 1896. Said motion will be made and based upon the affidavit of A. H. Carpenter hereto attached and served, and upon the papers and files and records of said case.

“L. W. ELLIOTT,
 “A. H. CARPENTER,
 “Solicitors for Complainant.”

County of San Joaquin. }
 State of California, } ss.

A. H. Carpenter, being duly sworn, says that he is one of the solicitors for the complainant in the above-entitled action; that on or about the 3d day of August, 1896, the complainant herein moved the above-named court to strike from off the files of this cause each and all of the pretended answers filed herein, on the ground that said answers, and each of them, did not conform with the requirements of the rules of this court, because they were not accompanied by a certificate of counsel that said answers were well founded in point of law; that said motion was temporarily denied by said Court, and leave was granted said defendants, and each of them, to file answers which should conform to the requirements of the rules of said Court; that said defendants, and each and all of them, have failed and neglected to comply with said order, and there are now no valid or lawful answers on

file in this cause; that said pretended answers were wrongfully filed in direct violation of the rules of practice of this court as provided in Rule 10 thereof.

A. H. CARPENTER,

Subscribed and sworn to before me, this 25th day of March, 1897.

[Seal]

C. L. FLACK,

Notary Public in and for said County and State."

That defendants' said second motion to set said action for hearing on bill and answers, and complainant's said three motions, affecting the defendant's answers, and the issues raised thereby, came regularly on for hearing before the Hon. W. W. Morrow, acting Judge of said court, and, after argument by counsel for the respective parties thereto, the same were submitted to the Court for decision.

The complainant objected to the granting of the defendants' said second motion to set said cause for hearing on bill and answers on the ground that said motion had already been made and denied by the Court; that it was renewed without leave of Court under the same circumstances as existed at the time the said motion was first made; that the issues herein were not settled within the meaning of the rule until all of complainant's aforesaid motions affecting said pleadings, and the issues therein, were disposed of, and the complainant should be allowed at least three months from the date of such disposition in which to take testimony.

The Court thereupon took said motion of defendant's to set said cause for hearing on bill and answers under advisement, and on the 12th day of April, 1897, granted said motion, and ordered said cause to be heard on bill and answers, and thereby refused to allow complainant to take testimony in support of his bill of complaint; to which order and ruling of the Court counsel for complainant then and there excepted.

That on said 31st day of March, 1897, complainant's motion for judgment on the pleadings was also duly submitted to the Court for decision after argument by counsel for the respective parties thereto, and the same was taken under advisement by the Court. The complainant urged all the grounds set forth in the written notice thereof as above set forth.

The Court, on the 12th day of April, 1897, denied said motion, on the ground that the facts stated in the complaint were not sufficient to warrant a judgment in favor of the complainant, to which ruling and opinion of the Court, counsel for complainant then and there excepted.

That said order of Court upon defendants' second motion to set said cause for hearing on bill and answers and complainant's motion for judgment on the pleadings, as entered in the clerk's records, is substantially as follows, to-wit:

[Title of Court and Cause.] No. 12022.

“Monday, April 12th, 1897.

“On motions heretofore submitted, a written opinion was filed by the Court. It is ordered that complainant's

motion for judgment on the pleadings be denied, and an exception allowed the complainant to the foregoing ruling. It is also ordered that defendants' motion to set cause for hearing on bill and answers be granted, and an exception is allowed the complainant to the foregoing ruling. It is also ordered that complainant's bill be dismissed, and defendants have a decree for their costs, and an exception is allowed the complainant thereto.

"That complainant's motion to strike out portions of the answers of said defendants, and his motion to strike said answers from off the files of said cause, were denied at the time of their submission, on the 31st day of March, 1897, and twelve days before the defendants' motion to set cause for hearing on bill and answers was granted.

Assignment of Errors.

The complainant makes, assigns, and relies on the following errors, to-wit:

1. It was error to entertain defendants' motion to set action for hearing on bill and answers when once denied and renewed, without leave of Court, under the same circumstances as existed when first made.

2. It was error to grant defendants' motion to set action for hearing on bill and answers when it had already been denied under the same circumstances as then existed.

3. It was error to set said motion down for hearing on bill and answers before the issues raised by the pleadings were settled.

4. It was error to set said action down for hearing on bill and answers without allowing the complainant a reasonable time from the date of the settlement of said issues to take testimony in support of his bill of complaint.

5. It was error to set said action down for hearing on bill and answers without giving the complainant three months' time from the disposal of said three several motions affecting the issues raised by said pleadings in which to take testimony in support of his bill.

6. It was error to deny complainant's motion for judgment on the pleadings.

7. It was error to hold that the sheriff, as an executive officer having no interest in the matter in controversy, could deny the material allegations of the bill, and thereby contest the complainant's right to redeem.

8. It was error to hold that the defendant O'Connor, mortgagee, having no interest in the matter in controversy, save the amount of his mortgage note, could deny the material allegations of the complaint, and thereby contest the complainant's right to redeem.

9. It was error to hold that the defendant O'Connor, mortgagee, having made Clinton H. Carpenter a party defendant to his suit of foreclosure, and a defendant in execution therein, was not estopped from denying said Clinton and his creditor's right to redeem.

10. It was error to hold that complainant's motion to strike out portions of the defendant's answers was made too late, and that it was not made at the proper stage of the proceedings.

11. It was error to hold that all or any part of the answers of the defendants, which the complainant moved to strike out, were proper or material allegations, because responsive to the bill.

12. It was error to hold that the title to C. W. Carpenter's interest in the realty of the firm of Bailey & Carpenter did not vest in his heirs at law at his death.

13. It was error to hold that Clinton, as an heir at law of C. W. Carpenter, had no interest in the mortgaged property because the estate had not been distributed.

14. It was error to hold that Clinton H. Carpenter, as defendant in the action of foreclosure, and a defendant in execution therein, had no right to redeem the mortgaged property.

15. It was error to hold that a person, having an interest in mortgaged property, could not redeem it from such mortgage sale.

The foregoing constitute the complainant's second proposed bill of exceptions to be used on appeal herein; and complainant prays that the same may be allowed, and certified as correct.

L. W. ELLIOTT,

A. H. CARPENTER,

Solicitors for Complainant.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD MCGORRAY,

Complainant,

vs.

MYLES P. O'CONNOR et al.,

Defendants.

Affidavit of Service.

State of California,

County of San Joaquin.

} ss.

A. H. Carpenter, being duly sworn, says that he is one of the solicitors for the complainant in the above-entitled action, and that he resides at the city of Stockton, California; that Warren Olney is the attorney for one of the defendants, O'Connor, in said cause, and that he, said Olney, resides in the city and county of San Francisco, said State, and has an office at the intersection of Bush and Sansome street in said city of San Francisco; that in each of the two places there is a United States postoffice, and that between the said two places there is a regular daily communication by mail; that on the 19th day of April, 1897, deponent served a true copy of the attached, "Complainant's Second Proposed Bill of Exceptions" on said Warren Olney, by depositing such copy on such date

in the postoffice at said Stockton, properly inclosed in an envelope, addressed to "Warren Olney" at his office aforesaid, the postage prepaid thereon.

A. H. CARPENTER.

Subscribed and sworn to before me this 19th day of April, 1897.

[Seal]

C. L. FLACK,

Notary Public in and for the said County of San Joaquin, State of California.

Received a copy of the complainant's within proposed bill of exceptions the 19th day of April, 1897.

DUDLEY & BUCK,

Attorneys for Respondent Cunningham.

[Endorsed]: Filed April 21st, 1897. W. J. Costigan, Clerk.

The foregoing bill of exceptions is hereby allowed and settled as correct.

Dated April 27th, 1897.

WM. W. MORROW,

Judge.

[Endorsed]: Settled and refiled April 27th, 1897. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD MCGORRAY,

Complainant and Appellant,

vs.

MYLES P. O'CONNOR, THOMAS

CUNNINGHAM, C. K. BAILEY, E.

F. BAILEY, ANDREW WOLF, R.

GNEKOW, JOHN JACKSON, T. W.

NEWELL, I. S. BOSTWICK, WM.

INGLIS, and MOSES MARKS,

Defendants and Respondents.

Notice of Appeal and Order^{ed} Allowing the Same

The above-named complainant, Bernard McGorray, receiving himself aggrieved by the orders of Court made and entered herein on the 31st day of March, 1897, and the 12th day of April, 1897, and the final judgment and decree made and entered on the 12th day of April, 1897, in the above-entitled proceeding, doth hereby appeal from said orders of Court and final decree to the United States Court of Appeals for the Ninth Circuit, and he prays that this his appeal herein may be allowed; and that a transcript of the record and proceedings and papers upon which said orders and final decree were made, duly au-

thenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Sept. 21, 1897.

L. W. ELLIOTT,
A. H. CARPENTER,

Solicitors for the Complainant and Appellant Bernard McGorray.

And now on this 21st day of September, 1897, it is ordered that the appeal be allowed as prayed for herein, and the amount of the bond to be given by appellant is hereby fixed at the sum of \$500.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed September 21, 1897. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Judicial
Circuit, Northern District of California.*

BERNARD MCGORRAY,
Complainant and Appellant,

vs.

MYLES P. O'CONNOR, THOMAS
CUNNINGHAM, C. K. BAILEY, E.
F. BAILEY, ANDREW WOLF, R.
GNEKOW, JOHN JACKSON, T. W.
NEWELL, I. S. BOSTWICK, Wm.
INGLIS, and MOSES MARKS,
Defendants and Respondents.

Assignment of Errors in the U. S. C. C. for the Ninth Circuit.

Now, on this 21st of September, in the year of our Lord, one thousand eight hundred and ninety-seven, in the city of San Francisco, State of California, comes the said Bernard McGorray, by L. W. Elliott and Amos H. Carpenter, his solicitors, and says that in the record and proceedings in the above-entitled action there is manifest error in this, namely:

I.

It was error to deny complainant's second motion to strike the answers from off the files and allow a default against the defendants, as each and all of them had refused to avail themselves of the Court's permission to add a certificate of counsel to their several answers in accordance with the requirements of the rules of Court.

II.

It was error to deny complainant's motion to strike out the said several portions from the answers of Myles P. O'Connor and Thomas Cunningham et al., the same being sham, irrelevant, and of such a character that none of said defendants could be heard to urge such allegations as a defense herein.

III.

It was error to entertain and grant defendants' motion to set said action for hearing on bill and answers when once denied and renewed, without leave of Court, under the same circumstances as existed when first made.

IV.

It was error to set said motion down for hearing on bill of complaint and answer before the exceptions to such answers and the issues thereby were settled.

V.

It was error to set said action down for hearing on bill of complaint and answers, without allowing the complainant a reasonable time after the disposal of the exceptions to said several answers and after the settlement of the issues raised thereby in which to take testimony in support of his bill of complaint.

VI.

It was error to set said action down for hearing on bill of complaint and answers, without allowing the complainant three months time from the disposal of said motions to strike said answers from off the files, to strike out the sham, redundant, and irrelevant matter contained in said answers and for judgment on the pleadings.

VII.

It was error to deny complainant's motion for judgment on the pleadings.

VIII.

It was error to hold that complainant's said several motions were not made at the proper stage of the proceedings, or that they were made too late, as the rules of Court specify no time within which such motions must be made, and as a general appearance therein and a con-

sent to a continuance thereof, and the setting the motions down for hearing on the merits, without raising the objection, and the failure to move to strike the same from off the files, was a waiver of such an objection.

IX.

It was error to hold that all or any part or portions of the said several answers of the defendants objected to by the complainant as sham, redundant, irrelevant, and conclusions of law were proper or material allegations, because responsive to the bill of complaint.

X.

It was error to hold that the sheriff, as an executive officer having no interest in the matter in controversy, had the right to deny the material allegations of the bill of complaint, and thereby contest the complainants' right to redeem.

XI.

It was error to hold that the defendant O'Connor, mortgagee, having no interest in the matter in controversy save the amount invested in his mortgage note, had a right to deny the material allegations of the bill, and thereby contest the complainant's right to redeem.

XII.

It was error to hold that the defendant O'Connor, mortgagee, having made Clinton H. Carpenter a party defendant to his action foreclosing the mortgage and a defendant in execution therein, was not estopped from denying said Clinton and his creditor's right to redeem.

XIII.

It was error to hold that the title to C. W. Carpenter's, deceased, interest in the real property of the firm of Bailey & Carpenter did not vest in Clinton H. Carpenter, one of his heirs at law, at the time of his death.

XIV.

It was error to hold that the title to C. W. Carpenter's interest in the real property of the firm of Bailey & Carpenter vested in C. K. Bailey, the surviving partner of said late firm, and not in said Carpenter's heirs at law.

XV.

It was error to hold that Clinton H. Carpenter, as an heir at law of C. W. Carpenter, deceased, or his creditor, had no interest in the mortgaged property of his late brother, and no right to redeem the same from the mortgage sale, because said estate had not been distributed to him as such heir.

XVI.

It was error to hold that Clinton H. Carpenter, as a defendant in the action of foreclosure, and a defendant in execution therein, or his creditor, had no right to redeem the mortgaged property.

XVII.

It was error to hold that a person, having either a vested or contingent interest, however slight, in mortgaged property, cannot redeem it from a mortgage sale, if the mortgagee or sheriff, making the sale thereof, objects to such redemption.

XVIII.

It was error to render a decree in behalf of defendants, the Court having set said action down for hearing on bill and answers, because all matters and allegations in said answers contained that were not responsive to the bill, or that were made on information or belief, or that were not positive, or that were allegations or denials of conclusions of law, could not be taken, treated, or considered as evidence on such a hearing.

XIX.

It was error to order a decree for the defendants upon the hearing on bill and answers, after excluding from con-

sideration those portions of said answers that were conclusions of law, irresponsive, and not positive allegations and denials, and those allegations made on information or belief, and leaving the material allegations of the bill, and the charges of collusion and conspiracy therein contained, undenied.

Wherefore, the said Bernard McGorray prays that the orders and final decree of the United States Circuit Court, Ninth Judicial Circuit, for the Northern District of California, be reversed, and that the United States Circuit Court of Appeals for the Ninth Circuit direct the entry of a decree below in favor of complainant and appellant, which will finally dispose of all matters of litigation herein as by law provided in actions of equity.

L. W. ELLIOTT,

A. H. CARPENTER,

Solicitors for Appellant.

[Endorsed]: Filed Sept. 21, 1897. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

At a stated term, to-wit, the July term, A. D. 1897, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Tuesday, the 21st day of September, in the year of our Lord, one thousand eight hundred and ninety-seven.

Present, Honorable WILLIAM W. MORROW, Circuit Judge.

BERNARD McGORRAY
vs.
M. P. O'CONNOR, et al. } No. 12022.

Minute Order Allowing Appeal.

Upon motion of A. H. Carpenter, Esq., counsel for complainant, and upon the filing of a petition for appeal together with an assignment of errors, it is ordered that an appeal be, and hereby is, allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree heretofore filed and entered herein, and that the amount of the bond upon said appeal be, and hereby is, fixed at the sum of \$500.

Bond on Appeal.

Know All Men by These Presents, that we, Bernard McGorray, as principal, and C. L. Flack and G. M. Pock,

as sureties, are held and firmly bound unto Myles P. O'Connor, Thomas Cunningham, C. L. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, their certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23d day of September, in the year of our Lord, one thousand eight hundred and ninety-seven.

Whereas, lately at a term of the Circuit Court of the United States, for the Northern District of California, in a suit depending in said court between Bernard McGorray, complainant, and Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, defendants, a decree was rendered against the said Bernard McGorray, and the said Bernard McGorray having obtained from said Court an allowance of his appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 27th day of October, 1897, next.

Now, the condition of the above obligation is such, that if the said Bernard McGorray shall prosecute his appeal

to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

BERNARD MCGORRAY, [Seal]

C. L. FLACK. [Seal]

G. M. POCK. [Seal]

JOSEPH H. BUDD,

Judge of Superior Court, San Joaquin County, California.

United States of America,
Northern District of California,
State of California,
County of San Joaquin. } ss.

C. L. Flack and G. M. Pock, being duly sworn, each for himself deposes and says that he is a householder in said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Subscribed and sworn to before me this 24th day of September, A. D., 1897.

C. L. FLACK.

G. M. POCK.

JOSEPH H. BUDD,

Judge of Superior Court, San Joaquin County, California.

Sufficiency of securities approved.

JOSEPH H. BUDD,

Judge of Superior Court, San Joaquin County, California.

Form of bond and sufficiency of sureties approved.

WM. W. MORROW,

Judge.

[Endorsed]: Filed Sept. 28, 1897. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, for the Ninth
Judicial Circuit, Northern District of California.*

BERNARD MCGORRAY,

Complainant,

vs.

MYLES P. O'CONNOR, THOMAS
CUNNINGHAM, C. K. BAILEY, E.
F. BAILEY, ANDREW WOLF; R.
GNEKOW, JOHN JACKSON, T. W.
NEWELL, I. S. BOSTWICK, WM.
INGLIS, and MOSES MARKS,

Defendants.

No. 12022.

Clerk's Certificate to Transcript.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 99, in-

clusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$60.20, and that said amount was paid by A. H. Carpenter, solicitor for complainant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 25 day of October, A. D. 1897.

[Seal]

SOUTHARD HOFFMAN,

Clerk United States Circuit Court, Northern District of California.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 27th day of October, 1897, pursuant to an order allowing an appeal duly entered and of

record in the clerk's office of the Circuit Court of the United States, for the Ninth Circuit Northern District of California, wherein Bernard McGorray is appellant and you are appellees, to show cause, if any there be, why the orders and decree rendered against the said appellant as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WM. W. MORROW, Judge of the United States Circuit Court for the Ninth Circuit, Northern District of California, this 28th day of September, A. D. 1897.

WM. W. MORROW,
Circuit Judge.

Service of the within citation is hereby acknowledged this 28th day of September, 1897.

WARREN OLNEY, per M.,
Attorney for the Defendant Myles P. O'Connor.

Service of the within citation is hereby acknowledged this 29th day of September, 1897.

DUDLEY & BUCK,

Attorneys for the Defendants Thos. Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks.

[Endorsed]: Filed October 7, 1897. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

[Endorsed]: No. 407. In the United States Circuit Court of Appeals for the Ninth Circuit. Bernard McGorray, Appellant, v. Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, Appellees. Transcript of Record. Appeal from the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

Filed October 25, 1897.

F. D. MONCKTON,

Clerk.

